Lands, Revenues and Trusts Review

Phase II Report

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Affaires indiennes et du Nord Canada

Canada

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Lands, Revenues and Trusts Review

Phase II Report

Published under the authority of the
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Minister of Indian Affairs and
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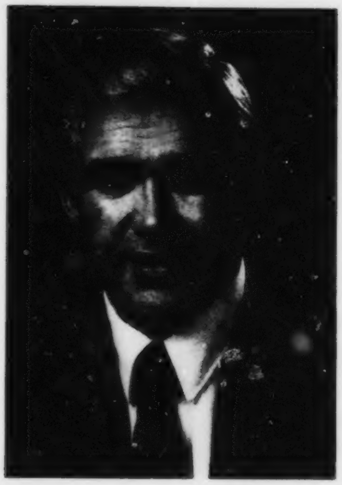
MESSAGE FROM THE MINISTER



The challenges facing Canada's Indian people today are very real, often complex and, in many cases, long-standing. To address these challenges, Indian communities and individuals are demanding — and must have — greater control of local affairs. As the Minister of Indian Affairs and Northern Development, I am committed to providing the opportunity for substantive and significant change in this regard.

It has become increasingly clear that real change is not possible under the existing *Indian Act*. It is obsolete and fails to address the needs, aspirations or capabilities of Indian communities. Over many years, Indian community leaders, band members and political organizations, as well as officials of my department, have voiced dozens of specific concerns with the Act. We now have a means to consider these concerns and to deal with them. The Lands, Revenues and Trusts Review has become the most comprehensive examination of the *Indian Act* ever undertaken.

The review has three basic goals:

- to propose possible changes to the *Indian Act* and related regulations that will recognize the authority of First Nations to exercise greater control of their own affairs, at their own pace;

- to develop new policies that reflect legislative changes and ensure that local community objectives can be achieved; and

- to adequately train and resource both First Nations and my department to properly administer existing and revised legislation.

Phase I of the review identified more than 250 specific concerns with the Act. We have already taken action on a number of these issues. Important amendments have been made to the *Act* in the areas of taxation, minors' trust accounts and estates. Many improvements have been made to internal departmental administration and the capabilities of the Lands, Revenues and Trusts Sector have been strengthened enabling it to more adequately carry out its responsibilities under the current *Indian Act*.

Phase II involved intense consultations with Indians at the national, regional and local level. The objective of these consultations was to develop a wide range of options for change in seven project areas: land management, land registry, moneys, estates, by-laws, band membership and elections. This report outlines the opportunities for change. I am sure other proposals will arise during the next phase of the review. The work of Phase II will serve as a solid basis for continuing the open and frank discussions of existing problems and opportunities for change.

Consultation has been important to this work to date. It will become even more so in Phase III. During this critical stage, we must work together and share our views and decide on how we can bring the *Indian Act* into the 1990s and beyond.

The work of this Review is both a personal priority and a priority of my department. It reflects my belief that the federal government must define and develop a new relationship with the aboriginal people of Canada — a relationship based on collaboration as opposed to paternalism. Most importantly, if legislative change is to occur it can do so only as a result of demands from Indian people. I am therefore committed to engaging in a collaborative consultation process across the nation, to ensure that whatever changes are made reflect the real needs and concerns of those most directly affected — Canadian Indians.

I am impressed by the range of options put forward in this publication. I believe they provide us with the opportunity to make the 1990s a time of dramatic progress for Indians in Canada. I urge Indian communities, individuals and political leaders at all levels to continue this work with energy, caution and patience. Your participation is essential to securing a more independent and prosperous future for First Nations.

Tom Siddon

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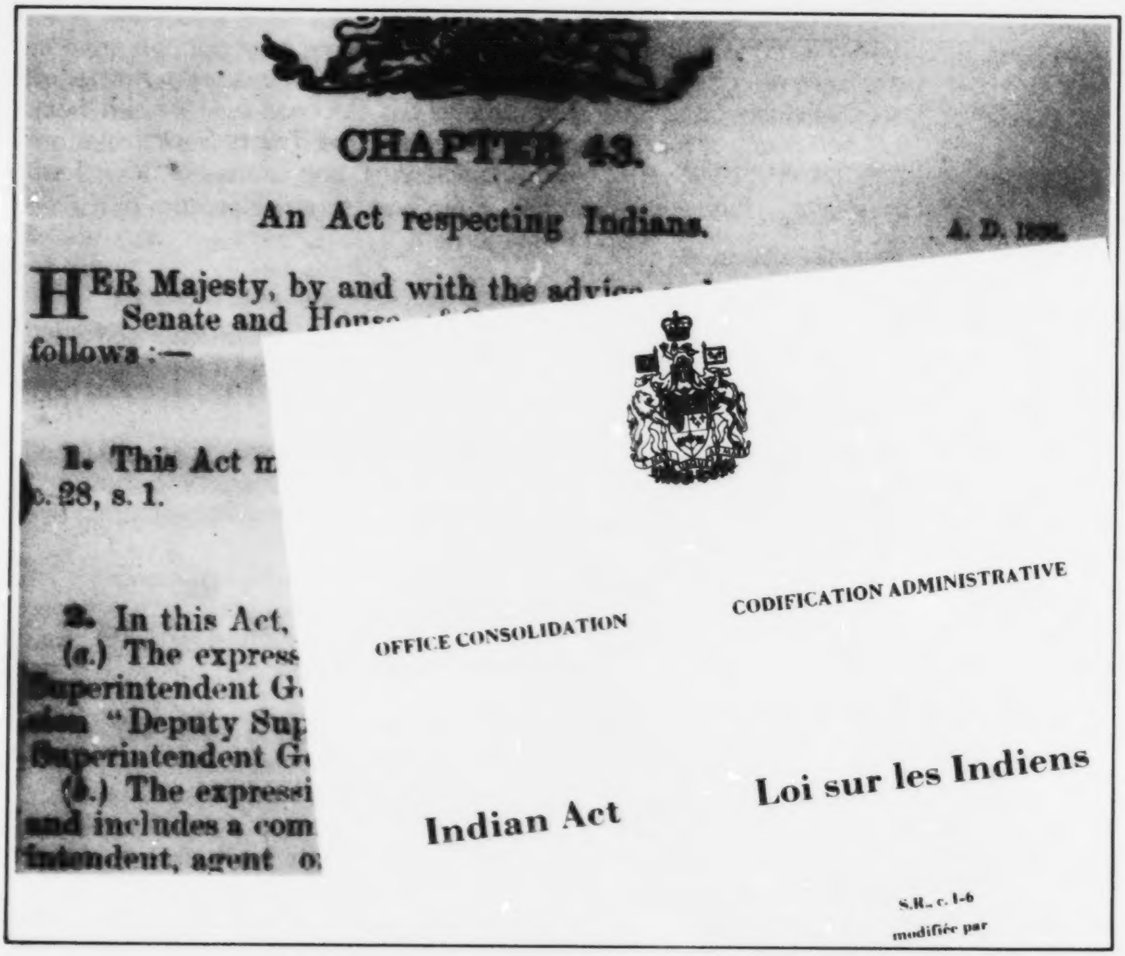


CHAPTER 43.

An Act respecting Indians.

A. D. [illegible]

HER Majesty, by and with the advice
Senate and House
follows :—

1. This Act m
c. 28, s. 1.

2. In this Act,
(a.) The express
Superintendent G
sion "Deputy Sup
Superintendent G
(b.) The expressi
and includes a com
intendent, agent o

OFFICE CONSOLIDATION

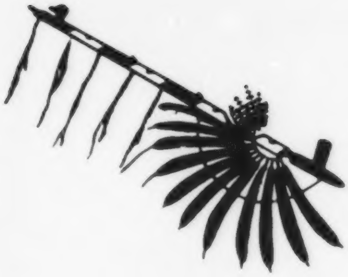
CODIFICATION ADMINISTRATIVE

Indian Act

Loi sur les Indiens

S.R., c. I-6
modifiée par

GUIDING PRINCIPLES OF THE LANDS, REVENUES AND TRUSTS REVIEW



The Lands, Revenues and Trusts Review is guided by the following principles:

- no unilateral reduction of the Minister's responsibilities to Indian people.
- the overriding direction of the Lands, Revenues and Trusts Review will be supportive of self-government. All initiatives will focus on this.
- every opportunity should be made to maximize local control by Indian people.
- proposals for change, including legislative changes, will be primarily optional in nature (i.e. bands will decide when they wish to undertake increased responsibility and accountability).
- as changes occur, the appropriate balance of individual rights and collective rights must be addressed.
- bands should have access to the resources required to assume responsibilities in the lands, revenues and trusts area.
- options for change must take into account the significantly lesser involvement of departmental officials in the conduct of Indian affairs.

THE LANDS, REVENUES AND TRUSTS SECTOR

The Department of Indian Affairs and Northern Development (DIAND) administers the provisions of the *Indian Act* and provides a wide range of services to status Indians across Canada. These functions, which are aimed at improving the overall social and economic conditions for Indians and advancing the cause of self-government, are carried out by different sectors within the department.

The Lands, Revenues and Trusts Sector of DIAND is responsible for:

• *maintaining a register of status Indians, as well as band membership lists for bands that have not assumed control of their membership program*. Between 40,000 and 50,000 routine entries are made to the Indian Register each year, due to births, deaths and marriages. In the past 4 1/2 years, more than 68,000 new names have been added to the Indian Register as a result of Bill C-31, which removed discrimination based on gender and marital status from the *Indian Act*. The workload in this area is growing dramatically. It is expected that the status Indian population will approach 500,000 by 1991.

- *managing Indian lands*. There are 2,261 Indian reserves in Canada, comprising approximately 2.711 million hectares (6.7 million acres). In 1987/1988, land transactions generating more than $30 million to Indian bands and individuals were under administration by the department.

- *registering all documents granting or claiming an interest in Indian reserve-designated and surrendered lands*. The Indian Land Registry contains more than 1.5 million entries. About 8,000 new transactions are entered into the Registry annually.

- *managing band funds*. Band revenues and capital moneys administered by DIAND total approximately $815 million.

- *managing the moneys of Indian minors, missing persons and mental incompetents*. Currently, there are 21,000 such accounts, with a value of some $165 million.

- *administering the estates of deceased Indians who normally resided on reserve or Crown lands.*

- *reviewing band by-laws and, where required by the Act, recommending either approval or disallowance*. Departmental officials register, on average, more than 200 by-laws annually. Between April 1/87 and March 31/88, 122 bands made some use of this instrument of local government, and the trend is expected to continue with the movement towards increased Indian control over their own affairs.

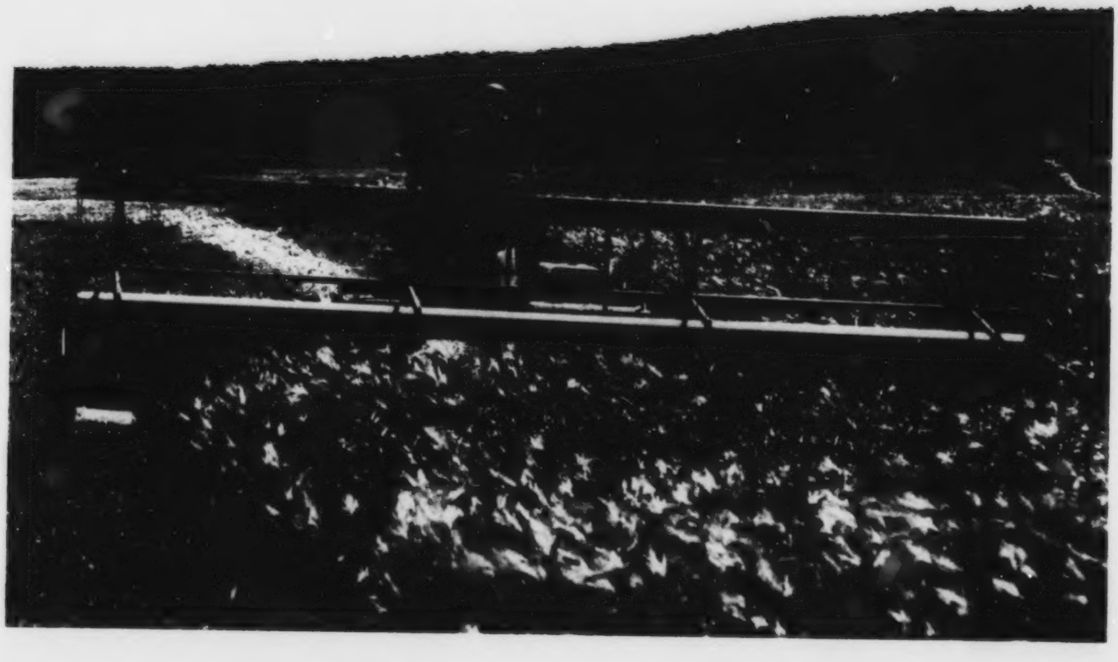
- *overseeing elections of band councils and election appeals for those bands whose elections are governed by the provisions of the Indian Act*. DIAND oversees the conduct of approximately 350 elections for chief and council. These elections are held every two years and represent a significant workload.

- *helping Indian and Inuit people respond to adverse environmental impacts (for example, from resource development projects or environmental emergencies) on their reserve lands, waters or traditional land-use areas.*

LAND MANAGEMENT

"A new land management system is required that meets the needs of Indian people for the management and development of their lands. All responsibility and authority for the management of lands should be transferred to the bands."

Band Member
Land Management Workshop
Kelowna, British Columbia
November 9 – 10, 1988



Overview

One of the most important assets of Canada's 596 Indian bands is their reserve land base. This currently totals 2.711 million hectares (6.7 million acres), representing an area half the size of Nova Scotia. These lands are crucial to Indian community life, cultural identity and economic development. However, under the current land management regime, bands have little direct control over their lands.

The *Constitution Act (1867)* gives the federal government exclusive authority to legislate with respect to Indians and lands reserved for Indians. The *Indian Act* defines a reserve as a "tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band." Only the federal government has the jurisdiction to regulate land use and land tenure on reserves. Parliament has exercised this jurisdiction since 1876 through a series of Indian Acts.

The *Indian Act* authorizes the Minister of Indian Affairs and Northern Development to exercise certain authorities with respect to the management of reserve lands including:

- managing reserve lands for the use and benefit of Indian bands;
- administering the land interests of individual band members;
- granting land interests to non-band members;
- authorizing land use and transfers of land for public purposes;
- supervising the surrender and designation of reserve lands; and
- authorizing band management of reserve land.

Based on this legislative authority, the department's view of its land management mandate is to ensure that Indian lands are managed:

- in accordance with the *Indian Act* and related legislation;
- in the best interests of Indian people; and
- in a manner that fulfils the legal and policy obligations of the Crown.

While many of the Minister's obligations are stated clearly in the *Indian Act*, other legal responsibilities exist that cannot be defined as precisely. These are derived from court rulings, policy commitments made by the government of the day and federal/provincial agreements concerning lands and associated resources.

DIAND currently administers more than 30,000 interests in reserve lands on behalf of Indian bands and individual Indians. In 1988, these interests produced approximately $30 million in revenues for bands, exclusive of revenues from oil and gas. During the next few years, both the number and value of land management activities are expected to increase by seven to 10 per cent annually. Indians clearly recognize, and have emphasized during the Lands, Revenues and Trusts (LRT) Review, that development of their reserve lands can contribute to economic self-sufficiency and self-government.

Issues and Options for Change

Since it was first enacted more than 100 years ago, the *Indian Act* has been revised several times. Nevertheless, in the view of Indians, it continues to reflect the paternalistic philosophy on which the first *Indian Act* was based. In fact, some features of the current Act can be traced back to the *Royal Proclamation of 1763* (e.g., the prohibited sale of Indian lands directly to non-Indians and the fact that all dispositions of Indian lands must be made to the Crown).

A related concern is the lack of consensus between Indian people and DIAND regarding the legal obligations of the Crown with respect to the management of Indian lands. In fact, the federal government's legislative jurisdiction over Indian lands is not generally accepted by Indians. For example, several participants in Phase II did not acknowledge the statutory authority of the Minister of Indian Affairs and Northern Development to make decisions regarding the management of their reserve lands for their use and benefit. This was despite the fact that the Minister usually exercises such authority only at the request or with the consent of Indian bands.

During Phase II of the Review, Indian people expressed great dissatisfaction with their lack of direct management control over reserve lands. Many insisted that Indians have a right to govern their lands, and that land management issues should be addressed in the broader context of self-government for Indian people. In virtually all cases, participants

emphasized that they were expressing personal opinions rather than stating formal positions of bands and other Indian organizations.

Another fundamental issue that emerged during Phase II discussions was the differing perceptions of what constitute Indian lands. Indians generally view these as including lands reserved for their exclusive use, as well as traditional lands off-reserve which were used for hunting, fishing and grazing. Moreover, their definition of land applies not only to a geographic area but also to the resources on and under that area — minerals, timber, pasture, water and wildlife. The Assembly of First Nations is, in fact, seeking constitutional recognition of these rights and of First Nation governments as a third order of government within Canada.

Furthermore, some Indian participants in the Phase II discussions argued that treaties are agreements between sovereign Indian Nations and the Crown. Indian leaders from areas covered by treaties emphasized that land management issues should be addressed in the context of the ongoing treaty claims process.

The major objective of Phase II was to identify and discuss opportunities to improve the management of Indian lands. A broad range of options emerged from the commentary of more than 150 elders, chiefs, councillors and band employees; from the review of historical and contemporary documents; and from interviews and survey data provided by DIAND officials. These options, as discussed elsewhere in this chapter, offer significant potential to address outstanding issues with respect to the management of Indian lands.

The *Indian Act:* An Inadequate Legislative Base for Managing Reserve Lands

"The Minister's role is perceived as being too much under the Act, which takes a very paternalistic approach to things."

Band Member
Land Management Workshop
Regina, Saskatchewan
December 7 – 8, 1988

"The Indian Act is a paternalistic tool for controlling the affairs of Indian bands. The Act does not give bands the authority that they need to protect their own lands."

Band Member
Land Management Workshop
Tobique, New Brunswick
November 29, 1988

During Phase II of the LRT Review, Indian participants, the consultants working on this project and DIAND officials identified a number of problems with the current *Indian Act* which make it inadequate as a legislative base for the management of reserve lands.

Among other things, the Act is paternalistic, ambiguous, inconsistent and incomplete.

Indian Act is Paternalistic

A commonly expressed concern among Indian people during Phase II of the Review was that the current *Indian Act* does not recognize bands as having proprietary interests in their own reserves. Many Indians objected to the fact that, under the Act, the authority and discretionary power for land management are vested in the Minister, and not in the band or band council. Neither bands nor band councils can independently grant interests in lands, dispose of lands or otherwise manage reserve lands. This led some Indian participants to assert that band councils are effectively treated like "minors".

MINISTER DETERMINING THE INTERESTS OF THE BAND

With respect to the management of reserve lands for the use and benefit of Indian bands, the current Act is structured around the concept that "*the Minister* may . . ." (i.e., at his/her discretion) make decisions and/or take action in a number of areas. For example:

- the Act empowers the Minister to authorize the use of reserve lands for certain purposes (such as Indian schools, the administration of Indian affairs and Indian health projects) without the consent of the band council.

- the Minister may authorize surveys of reserves and division of reserves into lots or other subdivisions. The Minister may also determine the location and direct the construction of roads on reserves. There is no reference in the Act to a role for the band or band council.

- the Minister may appoint a person to manage surrendered lands. Again, there is no reference in the Act to a role for the band or band council in the appointment of such a person.

MINISTER MANAGING INDIVIDUAL INTERESTS

The provisions of the Act that deal with administering the land interests of individual band members are similarly paternalistic:

- the Minister's approval is required to authorize lawful possession by a band member of land in the reserve allotted to the individual by the band council;

- Certificates of Possession are issued by the Minister to individual Indians as evidence of their right to possess land on the reserve;

- the Minister determines the compensation to be paid when an individual Indian is lawfully removed from reserve lands upon which he/she has made permanent improvements;

- the Minister approves all transfers of land by an individual Indian who is lawfully in possession of reserve lands to the band or to another band member; and

- the Minister approves the possession or occupation of reserve lands by devise or descent.

Ironically, although these provisions of the Act are clearly paternalistic, they were supported by some Indian individuals who participated in the Phase II discussions. This was in large part because the Minister's statutory obligations are seen as one way to protect the land rights of individual Indians. Indian leaders, however, were generally negative on this issue, expressing the view that ministerial involvement in the management of a band's internal land holdings is inconsistent with Indian self-government.

MINISTER GRANTING INTERESTS TO NON-BAND MEMBERS

With respect to the granting of land interests to non-band members, the Act empowers the Minister to:

- authorize (by issuing a permit) any person to occupy or use reserve land for a period not exceeding one year without involving the band or band council; and

- lease for the benefit of any Indian (upon his or her application) the land of which he or she is lawfully in possession without the land being surrendered.

The Minister may carry out these land management activities without reference to the band or band council. In practice, however, DIAND's policy is to seek the concurrence of the band or band council. The department rarely acts alone in granting interests to non-band members.

MINISTER'S FIDUCIARY OBLIGATIONS

Case law has demonstrated that the Minister of Indian Affairs and Northern Development has trust-like obligations to Indians in certain circumstances in managing reserve lands. These legal obligations are the result of the Minister being placed in the role of a fiduciary when a band surrenders reserve lands or designates reserve lands for the purpose of leasing.

Since the extent of the Minister's fiduciary obligations vary depending on the facts surrounding specific cases, no definitive statement of these responsibilities can be formulated at this time. The Minister and DIAND officials must, therefore, use judgement in deciding whether specific potential land transactions are in the interests of the band.

DIAND's policy of seeking a band's prior informed consent to such transactions is an effective way to deal with the Minister's fiduciary responsibility. Nevertheless, departmental officials must be concerned about both the quality and effective communication of information provided to the band as the basis for its consent. Consequently, supporting information for transactions is examined by staff on a case-by-case basis. By its very nature, this process may slow down the designation of land for the purpose of leasing, thereby impeding the commercial development of reserve lands.

DELEGATION OF THE MINISTER'S LAND MANAGEMENT AUTHORITIES

Sections 53 and 60 of the *Indian Act* are the primary vehicles for delegating ministerial land management authorities to bands. For example, under Section 53, the Minister may appoint a person to manage surrendered and designated lands on behalf of the Crown. Under Section 60, the Governor-in-Council may grant a band the right to control and manage land in the reserve occupied by that band. The land authorities exercised by the band are the Crown's authorities with respect to reserve land and not the band acting on its own behalf.

Therefore, delegation to bands does not relieve the Minister of legal responsibility with respect to the management of Indian lands. In fact, as a result of the legal obligations imposed on the Minister by the *Indian Act*, DIAND must limit the extent to which land management authorities are delegated to bands. This limitation takes the form of requiring that all transactions must be consistent with the *Indian Act* and all other relevant federal legislation and regulations.

Since ministerial authority can only be delegated — and not transferred — DIAND also requires that the exercise of land management authorities by bands be consistent with departmental policies and procedures. DIAND officials are obliged to monitor bands' exercise of these authorities to ensure due process and fulfilment of the Minister's obligations to protect both individual and band interests in reserve lands.

Indian Act is Ambiguous

AUTHORIZATION OF LAND USE FOR BAND PURPOSES

Under the current *Indian Act*, the Minister may authorize the use of reserve lands for the general welfare of the band (e.g., as a site for school or health projects). Where an individual Indian is in lawful possession of lands authorized to be taken for such a public purpose, the Act specifies that the individual be compensated for the loss of use. However, the Act does not:

- define "general welfare";
- specify who must pay the compensation;

- provide any criteria for calculating the amount of compensation; or

- clarify the disposition of the land if it ceases to be used for the general welfare of the band.

LANDS TAKEN FOR PUBLIC PURPOSES

Section 35 of the Act provides that, with the consent of the Governor-in-Council, reserve lands may be taken or used for "public purposes". However, the Act does not provide criteria for:

- determining compensation to the band or a band member when reserve lands are required for public purposes;

- determining how the compensation will be divided between the band and individual band members; or

- determining when compensation is to be paid.

UNDEFINED TERMS IN THE ACT

Several important land management-related terms in the *Indian Act* are not defined in any meaningful way. For example, the Act does not explain the meaning of the words "occupy or use" reserve lands in respect to the issuance of permits. The words "uncultivated or unused" as they apply to the issuing of agricultural leases are also not defined.

Problems are also evident in relation to surrendering lands. While the Act requires that a majority of the electors assent to a surrender, it does not define what would be considered a "majority" for these purposes.

Historically, DIAND has interpreted the Act to require an absolute majority of band electors. For example, if a band had 100 eligible electors, 51 of them would have to vote in favor of a surrender in order for it to proceed. However, a recent federal court decision arrived at a different interpretation of the word majority. The court ruled that provided a majority of the band electors attend the initial surrender meeting, a majority vote of those band members would be sufficient to either adopt or defeat a motion to surrender land. Using the previous example of 100 band electors, only 51 electors would have to attend the initial surrender meeting for a vote to be taken. If at least 26 of eligible electors at the meeting voted in favor of surrendering the land, the motion would pass.

Indian Act is Inconsistent

Phase II discussions also confirmed the long-standing problems with land management under the *Indian Act* with which Indian people and departmental staff have had to deal for years. Several sections of the *Indian Act* that deal with land management are inconsistent with one another causing uncertainty in interpreting and applying the intent of the Act.

For example, Section 37 of the Act specifies that reserve lands shall not be sold or leased "until they have been surrendered to Her Majesty by the band for whose use and benefit in common the reserve was set apart." However, Section 58(3) of the Act states that "the Minister may lease for the benefit of any Indian upon his application for that purpose, the land of which he is lawfully in possession without the land being surrendered." The maximum term of such a "locatee lease" is not specified. In the case of long-term locatee leases, this may be inconsistent with the surrender provisions of the Act.

Indian Act is Incomplete

Numerous gaps and omissions were identified in the *Indian Act* during Phase II of the LRT Review. Indian participants expressed particular frustration with the following.

CONDITIONAL ALLOTMENTS TO BAND MEMBERS

The current Act does not allow a band to grant an individual band member any lawful individual interest in reserve land other than through an "allotment", which requires that a Certificate of Possession be issued. Many bands want to grant their members individual interests in land, but do not want to grant all of the rights associated with an allotment under the Act. For example, some bands are of the view that leases to band members should be permitted. Concern was also expressed that the allotment of land by a band council to a band member might eventually lead to the complete alienation of reserve land from the use and benefit of the band collectively.

Some bands have granted interests in reserve lands to band members and families according to the "custom" of the band. However, these interests do not comply with the *Indian Act* unless they are confirmed by allotment from the band council.

Management of these "customary allotments" is a major issue on many Indian reserves. A land management system that ignores the existence of customary allotments, and the problems associated with them, fails to acknowledge the reality of land management on many reserves.

At the very least, the exclusivity of the Indian Act, which recognizes no land rights of individual Indians other than an allotment pursuant to the Act, is not consistent with the promotion of a right of Indian people to govern their reserve lands.

LEGAL CAPACITY OF BANDS OR BAND COUNCILS

Section 53(1) of the Act authorizes the Minister, or a person appointed by the Minister, to manage, sell or lease surrendered lands. Since neither the band nor the band council is a legal entity under the Act, neither the band nor the band council can be appointed as this "person". Consequently, the Minister has, in some cases, appointed individual band council members to act as this "person".

The lack of a legal capacity for the band or band council has caused problems for bands that want to enter into contractual arrangements with local and provincial authorities in order to develop and service reserve lands. For example, because bands are not legal entities, some municipalities are reluctant to enter into contracts to extend services (e.g., sewer and water lines) to the reserve.

STRATA-TITLING

Strata-titling provides a basis for registering ownership of individual condominium units in a land registry system. At present, strata-titling is addressed only through provincial legislation, which does not apply on Indian reserves. In the absence of the required statutory or regulatory authority in the *Indian Act*, the Indian Land Registry cannot accommodate strata-titling.

The lack of provision for strata-titling has impeded commercial real estate development on some reserves. For example, several bands have indicated a desire to construct and sell condominium projects on their lands. These bands are now seeking legislative provisions for strata-titling so that title to on-reserve condominium units can be sold to off-reserve purchasers. This would enable condominium projects located on reserve lands to compete effectively with projects off-reserve.

CONFLICT OF INTEREST

The potential for conflicts of interest and/or self-dealing emerged as a significant issue during Phase II discussions. Currently, there are no statutory or regulatory provisions to govern the actions of band councillors or band executives who could be involved in allotting interests in land to themselves or to family members. While DIAND has established a policy and procedures to address such conflicts of interest, in his Commission of Inquiry into the dealings of the Westbank Band, Commissioner John E. Hall, QC, identified a need for even stricter control over the land management activities of band councils and band executives.

INDIAN LAND REGISTRY

As discussed in the *Land Registry* chapter of this report, the *Indian Act* requires that DIAND maintain a Reserve Land Register. However, the Act does not provide an adequate statutory basis for the registry functions. (For their part, provincial governments have comprehensive land titles or registry acts which establish the legislative base for operating provincial land registry systems.) It also does not provide the Governor-in-Council with specific authority to establish regulations for the land registry functions.

BAND COLLECTION OF REVENUE MONEYS

Under the *Indian Act*, the Minister is responsible for ensuring that:

- bands receive fair compensation for interests granted in their lands; and

- rents owing under contractual arrangements with third parties are collected and deposited in band accounts.

However, the Act does not empower the Minister to delegate to bands the authority to collect revenues from interests granted in their lands. Nevertheless, DIAND has permitted many bands to collect revenues from leases and permits. For a more detailed discussion of this issue, see the *Indian Moneys* chapter.

DISPUTE RESOLUTION MECHANISMS

Other than the Minister's role in carrying out his responsibilities under the *Indian Act* there is no mechanism provided under the *Indian Act* for resolving disputes as to individual and band interests in reserve lands.

In his report on the Westbank Band, Commissioner Hall observed that the concept of an "ombudsman" might be useful in resolving disputes related to the local administration of Indian lands. While the Minister's responsibility and obligations would remain intact under this scenario, an ombudsman might reduce the number of cases on which the Minister was actually asked to rule.

The Indian Act Delays Land Administration

Many Indians who participated in Phase II discussions indicated that the procedural requirements imposed by the *Indian Act* and related regulations complicate and delay land transactions. These delays can result in lost economic opportunities for bands or increased development costs. Among the more obvious problems in this regard are the fact that:

- the Minister must approve allotments of reserve lands to individual Indians, even though the band council has already decided to allot the land;

- referendum regulations established pursuant to the *Indian Act* for the protection of both the band and the Crown specify time-consuming procedures which delay transactions (such as the designation of land for the purpose of leasing); and

- the Governor-in-Council must accept absolute surrenders or designations of reserve lands before they are effective.

DIAND's processing of land transactions is also affected by legislated requirements administered by other federal departments. Such requirements form part of the policy and procedural context within which DIAND must operate, and can impose delays which are beyond the department's control.

Consequences of Legislative Inadequacies

> *"DIAND procedures for processing land transactions involve substantial delays. The turnaround time for transactions can be up to two or three years. This deprives a band of several years' of revenue that it could otherwise have received if transactions could be concluded more quickly."*

Band Member
Land Management Workshop
Regina, Saskatchewan
December 7 - 8, 1988

> *"The lack of expediency by Indian Affairs in dealing with land transactions is a problem. Bands are concerned about the processing of land transactions, both in terms of turnaround time and consistent levels of service."*

Band Member
Land Management Workshop
Kelowna, British Columbia
November 9 - 10, 1988

The constraints placed on land transactions by the *Indian Act* and the delays involved in arranging for the Minister to grant legal interests and rights have impaired the use and development of Indian lands. For the sake of expediency, many Indian individuals and bands are today either not complying with, or are circumventing, the land management provisions of the Act.

Non-Compliance with the Act

One of the most common practices of non-compliance with the Act occurs in Western Canada, where many band councils enter into direct, or "buckshee", leases with non-Indians. As well, individual band members who hold interests in reserve lands (whether by Certificate of Possession or by custom of the band) sometimes enter into direct transactions with outsiders to grant rights or interests in these lands. For example, a band member might reach an agreement with a non-Indian farmer to farm the Indian's land on a cash or crop-share basis. Such transactions are outside the legislative and regulatory framework of the *Indian Act* and do not establish legal, registerable interests.

LONG-TERM PERMITS

The *Indian Act* authorizes the Minister to issue permits for short-term, non-possessory, non-exclusive use of reserve lands, such as for a public road or the right to graze livestock. In some cases, however, the opposite has occurred: long-term permits have been used to authorize possessory and exclusive use of lands for economic development projects, such as motels. By using this approach, bands can avoid the delays that result from designating land for leasing under the Act.

However, the granting of such long-term permits may be a breach of the surrender provisions of the *Indian Act*. Furthermore, permits are not considered to be satisfactory for securing debt financing from commercial lenders, since a permit does not create an interest in land that can be assigned to a creditor.

INCORPORATION

Under the *Indian Act*, reserve lands cannot be leased to a band member or a band. To circumvent this restrictive provision, bands and individual Indians have established corporations to operate businesses on reserve land. A primary reason for incorporation is to enable the business to acquire a land interest that can then be mortgaged to secure financing.

However, there is also a drawback to this approach. Since a corporation cannot be defined as an "Indian", even Indian-owned corporations operating exclusively on reserves are subject to federal and provincial corporate income taxes.

Restrictive Implications of the *Indian Act* for Land Management by DIAND

If DIAND were to administer reserve lands according to the restrictive wording of the *Indian Act* and without regard for the wishes of Indian people, the department would have to curtail its current attempts to accommodate the development aspirations of many bands. Some possible effects of strict administration of the Act by DIAND are outlined below.

- Long-term permits would not be issued for exclusive and/or possessory use of land. This may impede commercial development projects on reserves. In order to provide funding agencies with evidence of land tenure for an Indian-owned business, reserve lands would have to be designated for leasing by way of a surrender vote and a lease would have to be negotiated and signed.

- Band councils and band members would be prohibited from collecting revenues directly from leases and permits. Such revenues would be paid directly to the Receiver General for Canada, who would deposit the money in the band's revenue account or pay it to Indians in lawful possession of reserve lands, as appropriate. This process would significantly delay the receipt of revenues by the band.

- Allotments made by the band council to individual band members would be more closely reviewed and supervised by DIAND officials. This would require DIAND to ask band councils to justify allotments and further delay the allotment process.

- To avoid potential breaches of the surrender provisions of the Act, the Minister could be expected to curtail the granting of long-term locatee leases for the benefit of Indians who are in lawful possession of land.

Clearly, such restrictive administration of the *Indian Act* would inhibit Indian control of their own lands and impose greater impediments to the economic development of these lands.

Options for Change

"There are shortcomings in the current system for the department's management of Indian land. Fundamental change is required. The existing land management program should be scrapped and an Indian land management and development program established instead."

Band Member
Land Management Workshop
Kelowna, British Columbia
November 9 – 10, 1988

"Bands would like to begin to acquire expanded land management authorities and move ultimately to a situation in which the Minister of Indian Affairs (and Northern Development) is completely uninvolved in any land transactions, including the potential surrender of land. Bands would like a gradual move toward autonomy and to take on increasing responsibilities in stages."

Band Member
Land Management Workshop
Odanac, Quebec
December 13, 1988

The Need for Change

Indian people and DIAND officials recognize that the existing legislative framework for the management of Indian lands is incomplete, paternalistic, ambiguous and inconsistent. These factors combine to delay, confuse and frustrate those who strive to use reserve lands for the benefit of bands and individual Indians. Fundamental legislative change is required to recognize and define the authority of Indian bands to control and manage their own reserve lands.

Phase II of the LRT Review provided Indian people, the land management consulting team and DIAND officials with the opportunity to discuss a wide range of options for change. While some proposals would clearly require legislative change, a number of initiatives were also identified that would improve the management of Indian lands within the existing legislative framework.

Legislative Options

Two legislative options have been proposed, both of which would require long-term planning and the strong support of Indian people:

- amendments to the current *Indian Act*; and
- new legislation.

AMENDMENTS TO THE *INDIAN ACT*

During Phase II, numerous potential amendments to the *Indian Act* were identified that would enhance the current system for managing Indian lands. Such amendments could:

- increase band control over Indian lands;

- broaden the range of interests which can be granted in reserve lands to accommodate the current and future needs of bands and individual Indians;

- provide a clear legislative base for current land management practices;

- expedite transactions by removing some requirements for government review and approval; and

- resolve some of the ambiguity and inconsistency in the current Act.

However, there are problems with amending the Act. Firstly, the amendment process is not a shortcut to achieving Indian control over their own lands. During Phase II, more than 50 potential amendments to the land management provisions of the current *Indian Act* were identified. Amendments to some sections of the *Act* may also necessitate amendments to other sections.

Secondly, the proposed amendments may not fully address Indian concerns with respect to the management of their lands. The *Indian Act* imposes legal obligations upon the Minister that limit the potential for bands to assume control of reserve lands without active monitoring by DIAND to ensure compliance with the Act and with departmental policies and procedures.

Thirdly, many of the problems with the current system are inherent in any structure which is based on the paternalistic and outdated philosophy which underlies the *Indian Act*.

Finally, amending the current Act would in all likelihood require at least as much time as the passage of new legislation.

NEW LEGISLATION

On the other hand, new legislation may be a viable option for transferring land management responsibilities to First Nations. This would also serve as tangible recognition of First Nations' right to manage and control their most valuable asset. With new legislation, DIAND's mandate could vary with the level of responsibility assumed by different bands. In other words, the legislation could provide bands with the flexibility to assume whatever level of responsibility they desired.

New legislation could take the form of an *Indian Lands Act* that would exist completely apart from the *Indian Act* and deal primarily with the management of reserve lands by Indian people. This was, in fact, proposed by Commissioner Hall in his report on the Westbank Band.

An *Indian Lands Act* would provide a complete and comprehensive legislative framework for Indian land management that could be adapted to meet the needs of specific bands. This enabling legislation would recognize a band's right to exercise land management powers, and would give bands the option to exercise more extensive powers than those available under the current *Indian Act*. Under the new legislation, the Minister would transfer additional land management authorities only to those bands which choose to exercise them; otherwise, the relationship between the Minister and the band would remain unchanged.

New Indian lands legislation is consistent with the principles guiding the LRT Review. For example, this legislation would not involve a unilateral reduction of ministerial responsibility. It would be supportive of self-government and would maximize local control by Indian people. As well, new Indian lands legislation would provide flexibility and options for bands and would maintain the balance of individual and collective rights.

Such legislation could also accommodate the diversity of positions among bands with respect to the granting of land rights to individual band members. New Indian lands legislation could enable bands to determine the range of interests that individual band members could acquire in obtaining lawful interests in reserve lands.

Alternatively, a new regime for the management of Indian lands could be introduced as part of comprehensive Indian government legislation. In fact, the legislative changes required to address the concerns expressed by Indian participants in all areas of the LRT Review may be so extensive that a new *Indian Act* might be appropriate.

However, regardless of which of the above two options was adopted, new legislation would take several years to develop and enact. As a result, it would not have an immediate impact on current land management issues. Moreover, any impact would depend upon the rate at which bands chose to exercise the expanded land management authorities.

Policy and Operational Initiatives

"Bands are capable of looking after their own people and their own interests if they have the resources with which to do it."

Band Councillor
Land Management Workshop
Kelowna, British Columbia
November 9 – 10, 1988

During Phase II discussions, a number of policy and operational initiatives were identified that might alleviate, in the short term, some of the problems in the land management area. These initiatives, many of which can be implemented in Phase III, will enhance DIAND's land management services to bands. By enabling bands to maximize local control under the present system, they will help First Nations prepare for the exercise of full land management authorities in the future.

These Phase III initiatives fall into two categories:

- internal administrative initiatives which can be implemented by DIAND immediately; and

- policy and program initiatives recommended for joint study by Indian people and DIAND.

Phase III Administrative Initiatives by DIAND

REVIEW OF DIAND LAND MANAGEMENT FUNCTIONS

This Phase III initiative involves a review of the land management functions, roles, job responsibilities and classification levels within the Lands, Revenues and Trusts Sector. Appropriate job experience and knowledge requirements will be identified to ensure the proper selection and development of lands staff. This initiative is also designed to ensure appropriate job classification in order to attract and retain competent staff. Positions will be reviewed in the context of current and future organizational requirements, as well as the education, skills, and experience required to undertake the sector's evolving land management functions.

CLARIFICATION OF WORKING RELATIONSHIPS

DIAND's land and resource management functions under the *Indian Act* are allocated among several sectors of the department. During Phase III, the LRT Sector will clarify its working relationships with other sectors of the department that bear land management responsibilities in an endeavour to best ensure that the needs of Indian peoples are met.

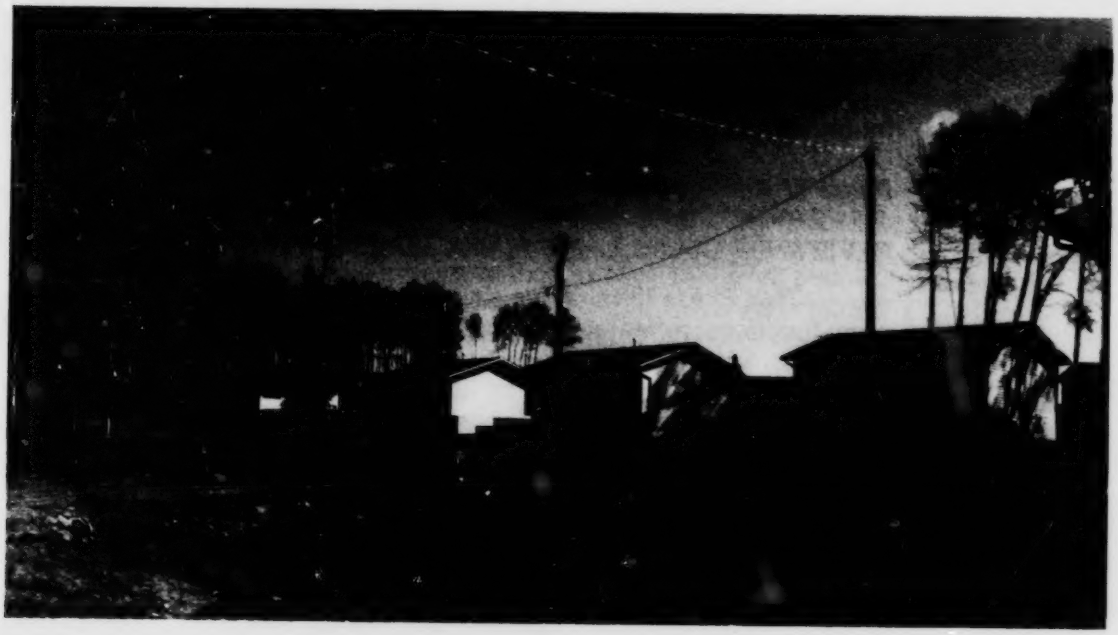
STANDARDIZE AND STREAMLINE PROCEDURES

A third initiative is designed to enhance administrative efficiency by streamlining and standardizing procedures. In this regard, flow charts will be developed for each major transaction process. These charts will be supplemented with checklists related to certain types of transactions (such as leases, surrenders, designations, etc.). The charts will also identify a few examples of typical variations from standard procedures and how to address these variations.

DIAND LANDS STAFF ORIENTATION

This Phase III initiative will promote the effective and consistent application of land management policy and procedures by orienting staff to the most current edition of the Land Management and Procedures Manual. This general orientation will supplement the Lands I and Lands II courses that are delivered within the sector.

Phase III Policy and Program Initiatives for Joint Study



BAND LAND MANAGEMENT TRAINING

Encouraging Indian bands to become more involved in the management of their reserve lands is a major objective of DIAND. This represents an important step toward the goal of Indian self-government. Delegation of land management authority under sections 53 and/or 60 of the Act is part of this process.

Many Indian participants in the Phase II discussions applauded the commitment of DIAND regional staff to provide instruction about policies and procedures for managing land transactions. At the same time, band staff who were responsible for land management activities identified a number of requirements for enhanced training. These included clarifying the scope of their duties and providing more hands-on experience in processing transactions. As well, an orientation program to familiarize new band councillors with the land management provisions and requirements of the *Indian Act* was suggested.

During Phase III, Indian people and DIAND will jointly review the training requirements of bands. A comprehensive training program will then be developed to facilitate band management of reserve lands under delegated authority.

FUNDING OF BAND LAND MANAGEMENT

The land management services that some bands provide to their membership exceed the scope of DIAND's land management mandate. One example is the management of allotments of reserve land according to band custom. As a result, bands are requesting funding from DIAND to support land management activities that are beyond the department's statutory and policy obligations.

As well, bands exercising delegated land management authorities contend that the current maximum funding limit ($35,000 per band per year) does not cover all the costs for lands staff or the use of professionals for legal work, land appraisals, surveys, etc.

In this regard, Phase III discussions will focus on:

- clarifying the extent of land management activities associated with delegated authority; and

- assessing the appropriate funding required from DIAND to cover the costs for land staff and associated professional services.

DEVOLUTION OPTIONS

Devolution of land management functions to bands and to other Indian organizations will also be explored during Phase III. As well, this initiative will consider the potential for other organizations to undertake the diverse and highly specialized non-transactional functions currently delivered in part by DIAND's lands staff. These functions may include:

- monitoring compliance with regulations on health and safety, mineral extraction, forestry and construction;

- appraising land values and negotiating third party interests;

- land administration functions, such as managing service agreements with other jurisdictions, property management, environmental management, etc.; and

- design and delivery of land management training.

GUIDELINES FOR CONFLICT OF INTEREST

As previously discussed, the *Indian Act* does not provide adequate safeguards against possible conflicts of interest or self-dealing by members of the band council and band executive. This is especially evident with respect to the granting of allotments.

Under this Phase III initiative, Indian people and DIAND will explore appropriate means for addressing the problems of conflict of interest and self-dealing.

Moving into Phase III

In addition to addressing the short-term administrative issues discussed above, Phase III of the Lands, Revenues and Trusts Review will provide an opportunity for Indian communities and DIAND to work together to explore the options for long-term legislative change. In this regard, Phase III efforts will focus on expanding band authority over land management, either by:

- amending the current *Indian Act*;
- developing a new *Indian Lands Act*; or
- developing wider Indian government legislation.

LAND REGISTRY

Overview

Sections 21 and 55 of the *Indian Act* require the federal government, through the Department of Indian Affairs and Northern Development, to operate an Indian Land Registry. The Registry is maintained in the National Capital Region under the direction of the Land Registrar, the official custodian of records concerning Indian lands. The Registry has two main functions:

- to register documents concerning Indian lands; and

- to provide information from these documents to a variety of users.

All documents granting or claiming an interest in Indian reserve land must be registered and deposited in the Indian Land Registry. This applies for both designated and surrendered reserve land. During the seven-year period from 1982 to 1988, 41,000 new land transaction documents were registered in the Indian Land Registry. The Registry now holds about 150,000 documents and some 210,000 indexes containing more than 1.5 million entries.

Each year, the Indian Land Registry issues an average of 2,000 Certificates of Possession to band members and 450 Registrar's Certificates confirming the most recent documents on record. As well, since documents held in the Registry constitute a public record, Registry staff are regularly asked to search for and release information on Indian lands. During an average year, Registry staff handle about 4,500 such requests. Users of this information include members of Indian bands, financial houses, lending corporations, development companies, commercial investors, farmers and DIAND program officers. The Indian Land Registry also distributes records to the department's regional and district offices and to band offices to enable staff to carry out land management activities.

Issues and Options for Change

During Phase I of the Lands, Revenues and Trusts Review, a number of problems were identified with the Indian Land Registry. These included concerns about:

- the incompleteness and inaccuracy of Registry records;
- procedural delays in registering documents;
- the need for local accessibility to Registry records;
- the inadequacy of survey plans; and
- the need for additional resources in the Indian Land Registry.

These issues were further explored by the Land Registry review team, in conjuntion with Indian communities and DIAND, during Phase II. Also studied were the Registry's data processing needs, organizational requirements and operational problems.

Based on the findings of the review team, recommendations for change have been put forth in four basic areas:

- computerized registration system;
- surveys and mapping;
- organization; and
- legislation and regulations.

Computerized Registration System

Recommendation: **The process of converting paper records in the Indian Land Registry to DIAND's computerized system should give priority to reserves with high transaction volumes.**

Rationale: The conversion of paper records to DIAND's computerized land registry system will likely take several years to complete. However, since the majority of registration transactions involve a relatively small number of reserves, the benefits of a computerized system could be obtained earlier by giving priority to the conversion of these reserves. Early conversion of these reserves would also reduce the time frame for the conversion process itself. This is because new transactions would be entered directly into the computerized system without first being recorded in paper records that must subsequently be converted.

Recommendation: **DIAND's existing computerized land registry system should be restructured and re-programmed.**

Rationale: DIAND's existing computerized system has been changed, reinforced and reconstructed so often that it is now extremely fragile. Moreover, the system is written in an outdated programming language that is no longer supportable. However, before any re-programming is undertaken new functional specifications should be developed. In this way, appropriate changes can be incorporated in the new program to make the system more efficient and effective.

Surveys and Mapping

Recommendation: **The quality of surveys of reserve lands should be improved.**

Rationale: Surveys of reserve lands undertaken by Energy, Mines and Resources Canada (EMR) on behalf of DIAND are not always consistent with records held in the Indian Land Registry. To address this problem, DIAND had planned to prepare and maintain its own registry index plans. However, these inconsistencies could be more effectively solved by improving survey standards. In this regard, surveyors would be required to note anomalies and deviations from registry records in their reports, copies of which would be provided to the department.

As well, DIAND could in future use the reference plans or property overlays prepared by EMR as a graphic index to the Registry records. This would require some additions to these reference plans on the part of EMR. These additions have already been discussed with the Surveyor General and will be implemented on a region-by-region basis.

Recommendation: **A Deputy Registrar of Surveys should be appointed.**

Rationale: The measures required to improve survey standards (as outlined above) will necessitate ongoing coordination of efforts with EMR. To address the many complications that arise in the relationship between registration (DIAND) and surveys (EMR), it is recommended that a surveyor be attached to the Indian Land Registry. In addition to playing a coordinating role, the Deputy Registrar of Surveys would be responsible for approving plans (surveys will be approved by the Registrar as well as by regional offices) and providing advice on survey matters to the Land Registrar and the Lands, Revenues and Trusts Sector in general.

In the view of the project review team, the appointment of a Deputy Registrar of Surveys is a fundamental decision upon which many other recommendations in this chapter depend.

Recommendation: **A flexible approach for survey plan submissions should be implemented.**

Rationale: Experience has shown that a land registration system will ultimately fail unless it is supported by a suitable survey structure. In the case of Indian lands, this structure is provided through the preparation of Canada Lands Surveys (CLS) plans. The project review team has determined that CLS plans should be required for long-term leases and permits involving reserve lands.

However, the preparation of individual CLS plans involves work at the site by a surveyor (including the erection of monuments on the parcel boundaries) and can be costly. A compromise solution would be to accept "unofficial" plans on an interim basis, with the understanding that these would be superseded by CLS plans within a specified time frame. This would help reduce costs, since CLS plans for a number of sites could be prepared in a single field trip. In support of this, some moneys will be redirected toward the survey of registered interests from mapping and other discretionary survey activities.

Organization of the Indian Land Registry

Recommendation: **The Indian Land Registry organization should be strengthened.**

Rationale: The Indian Land Registry organization within DIAND must be strengthened in order to improve its operations and reflect changing circumstances. Recommended changes include:

- increasing the Registry staff to handle a growing workload;
- providing standard instructions and training for staff; and
- providing an appropriate mix of clerical and research staff.

Legislation and Regulations

Recommendation: **The legal framework for Indian land registration should be better defined.**

Rationale: The *Indian Act* as it exists now is inadequate in this respect. The integrity of the Indian Land Registry would be significantly strengthened by the enactment of comprehensive legislation on land registration.

Potential Benefits from Implementing Recommendations

In conjunction with DIAND and Indian communities, the project review team has identified numerous benefits that would arise from implementing the recommendations discussed above. These can be grouped into four broad categories:

- improved service to Indian bands;
- improved efficiency of DIAND's land registry operations;
- improved effectiveness of the Indian Land Registry; and
- cost reduction.

Improved Service to Indian Bands

REDUCED BACKLOGS

Work flow reviews and monitoring, staff training and improved computer procedures will ensure more accurate and timely service in processing registration transactions and responding to inquiries.

ACCESS BY REGIONS AND BANDS

The computerized land registry system will provide DIAND regional offices and bands with access to Registry data at the local level. Such quick and ready access to current data will provide much improved local service for Registry operations.

FEWER ERRORS

Computerized procedures (including quality control and security features), better training and enhanced supervision will reduce the number of errors experienced in registration functions. This is an important benefit because errors can result is costly resolution processes.

Improved Efficiency of Operations

IMPROVED COMPUTERIZED REGISTRATION SYSTEM

As previously indicated, the computerized land registry system now in place at DIAND is fragile and must be replaced. A revised system, incorporating all the required features, will be more efficient and have improved quality control functions. As well, it will provide important information on productivity and backlogs.

SUITABLE WORK FLOWS

Work flows for registration operations can be easily reviewed to achieve the best use of staff and computerized facilities and to ensure appropriate quality controls and supervision.

Improved Effectiveness

PRIORITY CONVERSION

By giving priority to converting the records of reserves that have high volumes of registration transactions, DIAND will ensure that maximum benefits (improved efficiency) are obtained quickly from the computerized registration system.

STAFFING AND ORGANIZATIONAL ARRANGEMENTS

By introducing a suitable staff mix, with appropriate supervision, the efficiencies inherent in computerized procedures can be achieved.

Cost Reduction

FUNDING OF SURVEY COSTS

The costs of surveys for leases should be borne by the parties to the lease. Surveys required for other projects (such as housing developments) should be funded as part of the project.

UNOFFICIAL PLANS

Acceptance of "unofficial" survey plans, which would later be superseded by Canada Lands Surveys plans, would result in lower costs without endangering the survey structure.

IMPROVED SURVEYS FROM EMR

By obtaining better quality surveys from EMR, as recommended earlier, DIAND will avoid the cost of implementing its own plan to identify anomalies between surveys and registry records.

ENHANCED REFERENCE PLANS FROM EMR

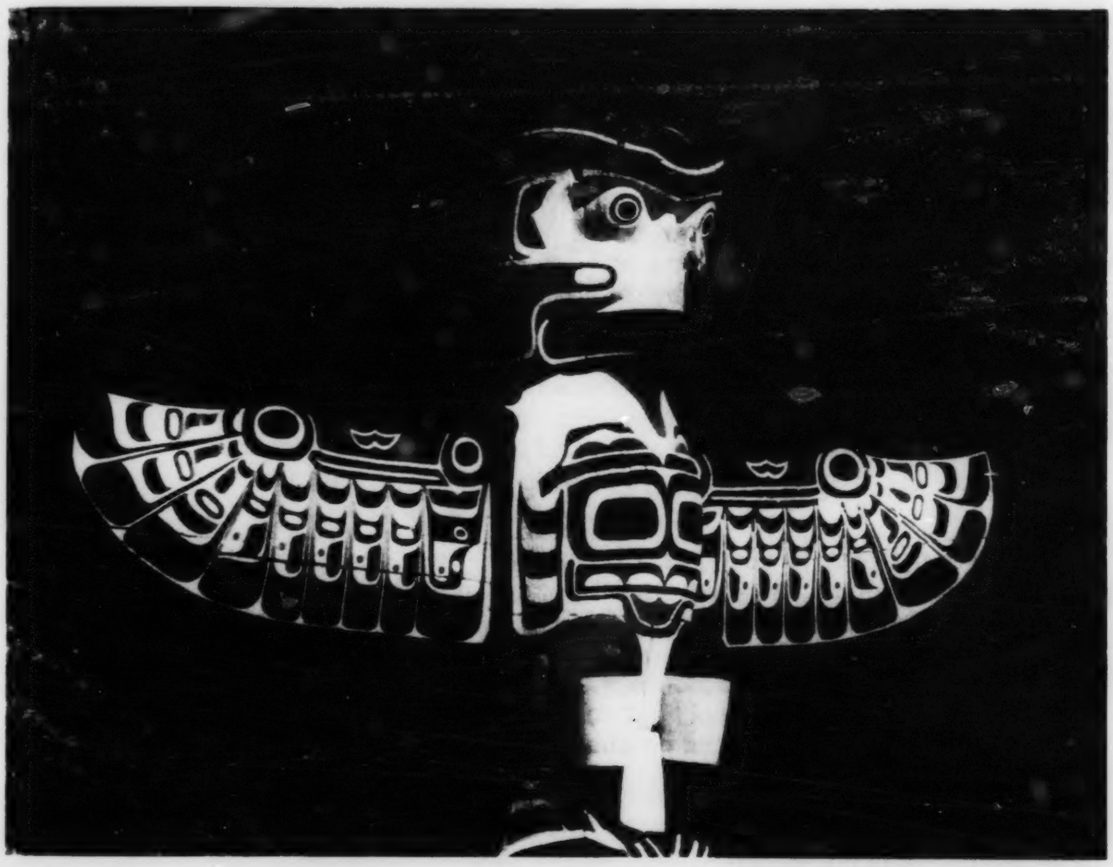
The receipt of enhanced reference plans from EMR will enable the Registry to avoid the cost of preparing its own plans.

Moving into Phase III

During Phase II of the Lands, Revenues and Trusts Review, 40 activities related to land registry were identified for implementation in Phase III. A sequence for implementing these activities was also developed.

INDIAN MONEYS

"The Indian Act restricts the things we can do. We are at a point where we want to think for ourselves; we want the right to determine how our money should be used."



Overview

The term "Indian moneys" was first defined in the 1951 revision of the *Indian Act* as "all moneys collected, received or held by Her Majesty for the use and benefit of Indians or bands". Indian moneys belong to particular bands and certain individuals but, under the terms of the *Indian Act*, are held by the department of Indian Affairs and Northern Development (DIAND). This money is not part of the department's budget from which contributions are made to bands.

There are three types of Indian moneys:

- *Capital moneys* are derived from the sale of band lands or capital assets. The federal government has interpreted capital moneys to include payments for non-renewable resources such as oil and gas, timber, minerals and sand and gravel extracted from reserve lands.

- *Revenue moneys* are derived from the rental or leasing of band lands, from selling renewable resources (such as crops) and from interest earned on money held in capital and revenue accounts.

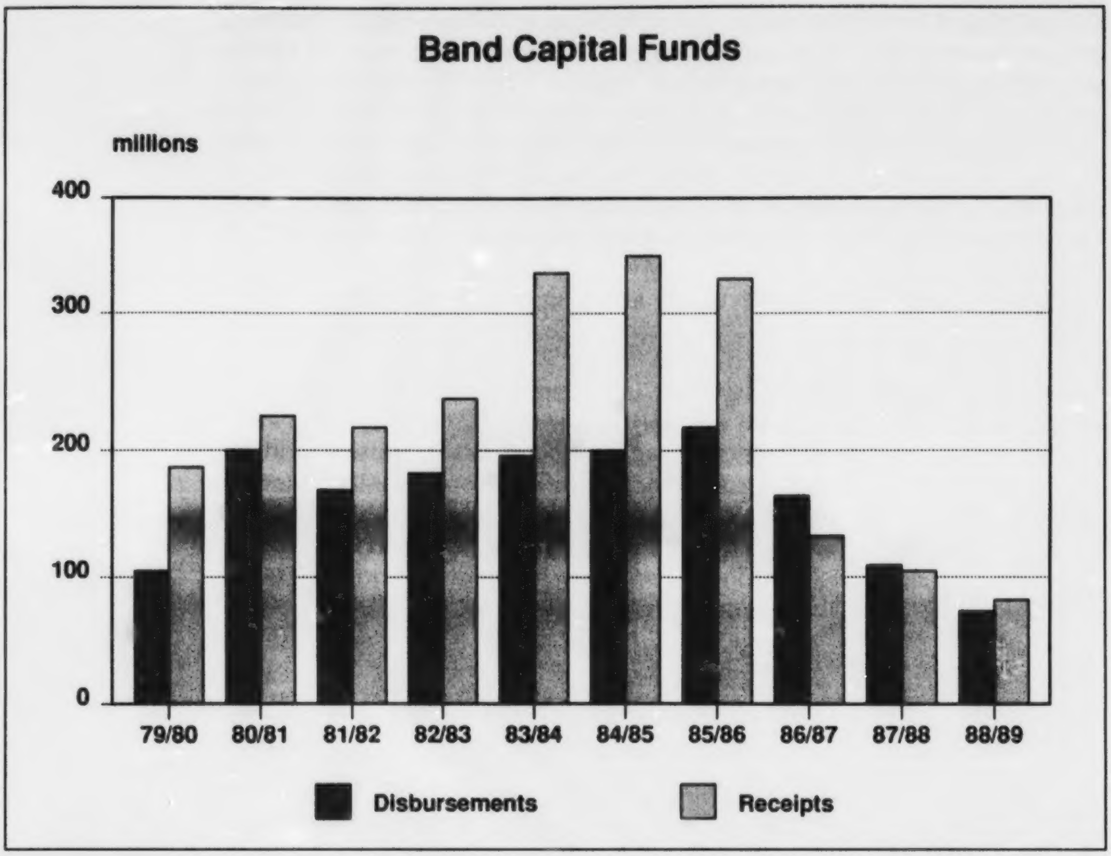
- *Individual moneys* are held for such persons as minor children, missing persons and mental incompetents. Most of these moneys are held on behalf of minors who have received per capita distributions (payments to individual band members) from a band's capital moneys. A full discussion of individual moneys will be found on page 45.

Under terms of the *Indian Act*, capital and revenue moneys are held on behalf of bands for their collective benefit. The Act requires that these moneys be collected by the Crown and held in the federal government's Consolidated Revenue Fund (CRF) until such time as a band requests, and the Minister approves, release of funds for a particular purpose. Interest is credited to band accounts twice a year, based on month-end balances and interest rates determined on a quarterly basis. The interest rate for both capital and revenue money accounts is based on the market average yield of long-term Government of Canada bonds.

Over the past 10 years, $2.1 billion have been deposited into band capital accounts, largely from oil and gas royalties. During the same period, $1.6 billion have been paid out to bands. As of October 31, 1989, band capital accounts contained a total of $742,389,945. Deposits to band revenue accounts have totalled $769 million over the past 10 years, with an outflow of $698 million. As of October 31, 1989, band revenue account balances amounted to $64,251,393.

In the case of individual moneys, the Minister of Indian Affairs and Northern Development is responsible to the individual, not the band. Individual moneys are also held in the Consolidated Revenue Fund, with interest credited to accounts twice a year at a rate determined by the average market yield to maturity on long-term Government of Canada bonds. As of October 31, 1989, DIAND held more than $157 million in individual trust accounts.

Indian bands and individuals may also have moneys that do not fall into any of these three categories and, therefore, are not subject to the provisions of the *Indian Act*. For example, bands or band organizations may receive money from the use or sale of band property other than reserve land or from investments. These are not considered to be Indian moneys under the terms of the *Indian Act*, and the Crown has no responsibility for these funds. The Minister's responsibilities for



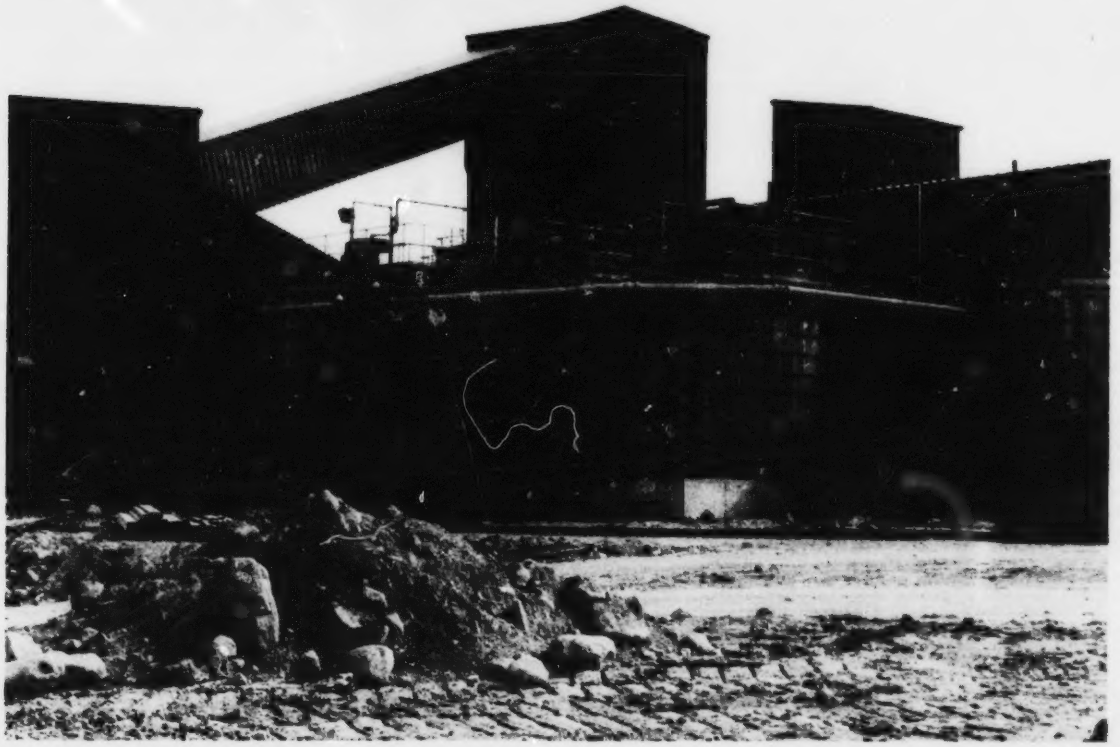
moneys received as a result of claims settlements vary according to the basis of the claim and the terms of individual agreements. These responsibilities, where they exist, are generally arrived at through negotiations.

Issues and Options for Change

The current *Indian Act* requires that the Minister of Indian Affairs and Northern Development make the final decision on virtually all issues related to Indian moneys. In so doing, it significantly restricts the ability of bands to make their own decisions on how and when their money is used. As well, the Act does not provide for the recognition of band customs or traditions in the management and use of Indian moneys.

This situation is no longer in keeping with Indian communities' desire for greater control over their local affairs or with the government's policy of devolution. During Phase II discussions with Indian communities, many Indian leaders argued that bands should have complete control over their capital, revenue and individual moneys. Others saw some continued ministerial involvement as desirable.

Aside from the desire for greater control over their moneys, Indian leaders also expressed concern about specific aspects of the current legislative and management regime. For example, the classification of oil and gas royalties as capital rather than revenue moneys was a source of concern, since the Act describes a far more rigid regime for the expenditure of capital dollars. As well, the view was commonly expressed that higher rates of return could be earned if Indian moneys were invested outside the Consolidated Revenue Fund.



The impact of Bill C-31 on Indian moneys is also seen as a problem by many Indian communities. Bill C-31 has resulted in the reinstatement or first-time registration of more than 58,000 Indians. This dramatic increase in band populations has also increased the demand against the bands' moneys. A related concern is the impact of per capita distributions on a band's capital account, and how the rights of future generations to a share of these moneys can be protected.

Among the other problems identified in Phase II discussions were:

- delays in ministerial approval of expenditures, which are perceived as resulting in missed opportunities for investments;

- the lack of a mechanism to enable bands to create some form of "heritage" fund to protect their moneys for the future; and

- the lack of a legal basis under the Act for bands to collect revenue moneys directly.

Phase II work on the Indian moneys project of the Lands, Revenues and Trusts Review has clarified the mandate and responsibilities of the Minister of Indian Affairs and Northern Development under the current *Indian Act*. As well, a number of measures were identified for improving the department's management practices in the short term. Finally, in consultation with Indian communities and DIAND officials, a range of options for change were developed (some of which involve legislative change) with a view to increasing local control by Indian people.

These and other issues are discussed in some detail in the remaining pages of this chapter.

Role and Responsibilities of the Minister — Capital and Revenue Moneys

"Right now the Minister tells us if and when we can use our money — it's time for us to make our own decisions."

Background

A distinct legislative and policy regime is in place for each type of Indian moneys.

CAPITAL MONEYS

Under Section 64 of the *Indian Act*, band councils may ask the Minister to release a portion of its capital moneys by providing DIAND with a band council resolution that indicates the purpose for which the funds are being sought. The consent of the band as a whole is not required for the release of capital moneys.

Sub-sections 64(1)(a) to (k) of the Act outline the purposes for which capital moneys may be released. With two exceptions, the decision to release moneys has been delegated to DIAND's regional officials. The exceptions are when the money is to be used for the purchase of land to become part of the reserve (sub-section 64(1)(d)) and for "any other purpose that in the opinion of the Minister is for the benefit of the band" (sub-section 64(1)(k)). In these cases, departmental officials make recommendations to the Minister to release or withhold the funds requested. In all cases, the Minister, through the department's officials, is required by Section 61 of the Act to ensure that Indian moneys are expended only for the use and benefit of the band as a whole.

Sub-section 64(1)(a) permits the per capita distribution to band members of up to 50 per cent of a band's capital moneys accumulated over time. In such cases, the Act requires the Minister to ensure that all band members are treated equitably. As indicated earlier, per capita distribution payments may be held in trust by DIAND (see section on *Individual Accounts* later in this chapter) when the payments are made to minors, mentally incompetents and certain other individuals.

REVENUE MONEYS

Approximately 75 per cent of bands have received Section 69 authority. However, in practice these powers are exercised by the band council. Band revenues are generally received by DIAND's regional or district offices which deposit the funds in the Consolidated Revenue Fund. As with capital moneys, bands may ask the Minister to release revenue moneys through a band council resolution. Section 66 of the Act obliges the Minister to ensure that revenue moneys are used for the general progress and welfare of the band and its members.

ROLE OF A TRUSTEE

Historically, the department's view has been that the Minister's obligations with regard to the management of Indian moneys are "trust-like" in nature. Legal analysis conducted during Phase II of the Review reinforced this view, and legal arguments put forth in the landmark *Guerin* case also suggest that a trust relationship exists.

Under trust law, the standard of care owed by a trustee is that of the reasonable care and skill of a prudent businessperson. Courts will not intervene unless it is shown that the trustee is not acting in good faith. At a minimum, a trustee would be required by a court to:

- act in the interest and for the benefit of the beneficiary; and

- not realize a profit from its custody of moneys prior to their expenditure.

Taking into account these broad standards, a trustee is also obligated to ensure that trust moneys are not left idle, but rather that they are invested safely and productively. In deciding how the funds should be invested, a trustee would normally take into account such factors as:

- market conditions;
- the quality and duration of the investment;
- the duration of the trust and beneficial interests involved;
- the financial situation of beneficiaries;
- the impact of taxation and inflation; and
- the extent and manner in which investments should be diversified.

A trustee also has a duty to personally carry out his/her trust responsibilities. While some delegation is permitted where it is necessary or meets prudent business practices, the trustee must determine the suitability of appointed agents and is responsible for their supervision. Moreover, delegation of responsibilities to an agent does not relieve the trustee of his/her obligations.

Problems Identified by Indian Communities

Sections 64, 66 and 69 of the current *Indian Act* dictate that the final decision on virtually all matters related to Indian capital and revenue moneys rests with the Minister of Indian Affairs and Northern Development, and not bands themselves. Despite attempts by DIAND to interpret these sections of the Act in the broadest possible way, many bands believe that the practices that have resulted from this approach do not go far enough in dealing with their concerns.

As a result of the trust-like obligations established by the *Indian Act*, the Minister must operate against a standard of care similar to that of a trustee. In this regard, the Minister's investment obligations are discharged by depositing Indian moneys in the Consolidated Revenue Fund.

However, as a trustee the Minister is unable to delegate full decision-making powers with respect to expenditures to an agent (i.e., a band). Instead, the Act requires the Minister to personally ensure that expenditures of capital and revenue moneys are for the benefit of all band members, which in turn means the Minister must have access to detailed information about the planned expenditures. Bands are becoming increasingly frustrated with this requirement, which they view as an intrusion into band affairs.

Clearly, the *Indian Act* regime for management of Indian moneys is not satisfactory to bands nor consistent with the government's policy of self-government. On the other hand, in his 1986 report to Parliament, the Auditor General of Canada highlighted the lack of a legislative base that would enable bands to assume the authority and responsibility they seek to manage their own moneys. This point was also raised by the recent Commission of Inquiry dealing with the Westbank Band. In his report, Commissioner John Hall emphasized that "if the Act is out of step with desirable practice, the Act should be brought into line so that initiative is not stultified".

Management Issues — The Potential for Short-Term Improvements

"Current departmental practices are far too time-consuming and never seem to involve the bands."

Background

As indicated earlier, DIAND has attempted to interpret sections 64, 66 and 69 of the *Indian Act* as broadly as possible in order to provide Indian communities with greater control over their moneys. However, both the Auditor General and Commissioner Hall of the Westbank Inquiry have expressed concern about the degree to which the provisions of the Act have been loosely interpreted. This concern is shared in large part by First Nations and the department.

Among the current practices considered questionable under the Act are:

CAPITAL MONEYS

- The use of capital moneys for day-to-day expenses. This practice is depleting band capital accounts and some band members are concerned that there may be no trust moneys left for future generations.

- The overall lack of attention (until recently) to the impact of expenditures on the balance of capital moneys. This is a significant concern because many bands face declining cash inflows from oil and gas royalties due to lower prices and depleting reserves.

- The lack of monitoring of bands' capital money expenditures to ensure that the money is used for the purpose for which it was approved.

REVENUE MONEYS

- DIAND's tolerance of the collection of revenue moneys and, in some cases, capital moneys, by bands.

- The exercise by band councils of powers granted to bands under Section 69(1). This raises the question of the role of individual band members in the management of revenue moneys.

- In some cases, the release of revenue moneys to bands with section 69(1) authority without a clear indication, either through annual budgets or individual expenditure requests, of the purpose for which the moneys are sought.

- The lack of procedures to revoke Section 69(1) authority if the Minister becomes aware that a band's expenditures are not in accordance with Section 66 of the Act, as required by the *Indian Band Revenue Moneys Regulations*.

Under the existing legislative and management regime, the Minister is placed in a difficult position by competing demands. On the one hand, failure to carry out the trust-like responsibilities provided for under the *Indian Act* could lead to charges that the Minister is not fulfilling his/her obligations to band members. On the other hand, many bands are demanding even greater control over the moneys held on their behalf.

During Phase II, it became clear that, unless the *Indian Act* is amended (particularly in the area of revenue moneys), DIAND will be forced to adopt a more stringent system of controls over the expenditure of Indian moneys. It was also clear that neither bands nor the department would welcome such a move, which would be contrary to the government's policy of increasing local control as a means of moving toward self-government.

In addition to looking at long-term solutions, Phase II of the Review provided an opportunity to improve the management of moneys within the constraints of the current *Indian Act*. In this regard, both First Nations and DIAND identified a number of potential administrative improvements. The consultants working on the moneys project also provided recommendations that directly addressed some band concerns as well as the criticisms of the Auditor General.

These potential improvements are discussed in detail below. Strategies for implementing the various measures will be developed in consultation with First Nations during Phase III.

Approval Process for Capital Expenditures

Indian bands and departmental officials have expressed concern that the current process for approving capital expenditures is bureaucratic, time-consuming, and can place the Minister in the role of overriding a band initiative. As well, they have pointed out that many important decisions are made at headquarters rather than at the regional level, where the needs of a band may be better understood. These factors contribute to a general feeling that bands do not have a role to play in the approval process, or reasonable access to the decision makers. At the same time, it must be recognized that the current *Indian Act* restricts the degree of decision-making authority that can be delegated by the Minister.

Under the existing approval process, the Minister or a departmental official is required to assess requests by bands to spend capital moneys. To support their requests, bands have been required to provide detailed information and analysis. While this may continue to be necessary for specific expenditure proposals, a number of measures were identified during Phase II that could help streamline the process and provide bands with greater influence over how the moneys will be spent. The new elements of the process would be:

- closer working relationship between bands and the department;

- delegation of a much wider range of responsibilities to the regional level, thereby moving decision-making closer to the people involved; and

- more timely resolution of items submitted under Section 64(1)(k) of the Act (expenditure of capital moneys "for any other purpose that in the opinion of the Minister is for the benefit of the band").

While recognizing the constraints imposed by the current legislation, First Nations believe they can still take on a more significant role in the management of their moneys by maximizing band involvement in the decision-making process. In fact, both DIAND and First Nations are becoming increasingly uncomfortable with the current decision-making process. For example, there has been a tendency to almost routinely approve expenditures for First Nations that have accumulated considerable sums of money over the years. In such cases, little consideration has been given to whether the expenditure conforms with the overall community's view of how the band's money should be used.

Today, First Nations are giving much greater consideration to what they actually hope to achieve with the expenditure of capital moneys. During Phase II discussions, some bands suggested that this "community view" could be translated into a long-term plan that would enable them to take into account their individual customs and traditions, and, at the same time, safeguard the future interests of the band.

Such a long-term framework would provide guidance to all players and help eliminate confrontations between bands and the department, and between band councils and band members. This community-driven exercise (First Nations have highlighted the need for information and discussion at the community level) would provide an opportunity for band members to give direction to their elected officials — the band council. In turn, the band council could assure the Minister that the proposed expenditure reflects the objectives of the band as a whole — the test for all expenditure requests under the existing Act. Fewer confrontations and greater assurance of band support for expenditure requests would clearly contribute to closer working relationships between bands and the department.

Phase III consultations will provide an opportunity for bands to articulate their views on this proposal. The kinds of questions that will arise include:

- What portion of money, if any, should be protected for the future?

- What are the rights of future generations?

- Should a portion of money be retained for elders?

- What portion of money should go toward the economic development activities of the band or band members?

A second proposed initiative addresses both the need for greater delegation of authority to DIAND regional offices and a more timely process for approving Section 64(1)(k) expenditure requests.

Bands have long expressed frustration with the time required for approval of requests to spend capital moneys under Section 64(1)(k) of the *Indian Act*. While the Act requires that the Minister must personally approve each request, steps can be taken to improve the turnaround time for these decisions. For example, it would be useful to establish closer cooperation between the regional office and band representatives at an early stage in the process — as proposals are being developed. As well, outside expert advice could be obtained where necessary.

During Phase III, the Indian moneys project team, in consultation with First Nations and DIAND officials, will address this issue by developing a reasonable list of criteria for Section 64(1)(k) expenditure requests. This will ensure that both First Nations (which make the requests) and the department (which recommends approval to the Minister) will be operating from the same playing field. Moreover, analysis and advice to the Minister on individual requests will be prepared at the regional level, with the participation of bands and expert advisors. This will change what has essentially been a headquarters' activity to one conducted at the regional level.

The department will put this new regime in place as soon as possible. In addition to a quicker turnaround of Section 64(1)(k) requests, it should significantly increase band participation in the decision-making process.

Monitoring of Capital and Revenue Dollar Expenditures

Section 61 of the *Indian Act* requires the Minister to ensure that Indian moneys are spent only for the use and benefit of the band. This implies that DIAND should be able to assure the Minister that all moneys have been spent for the purpose for which they were approved. In other words, if the Minister approved a $5,000 expenditure for fencing on a reserve, departmental officials should be able to establish that the money was actually spent on fencing and that reasonable value was received.

Obviously, to provide this kind of assurance for every expenditure approved by the Minister would require large numbers of people whose sole responsibility would be to check on all band spending. During Phase II discussions, Indian community leaders and DIAND officials suggested that less intrusive and more professional ways existed for achieving these ends. These could, for example, include specific certifications by band auditors. While no firm proposal has been adopted by the department in this regard, over the coming months guidelines for monitoring expenditures of capital and revenue moneys will be developed in close consultation with bands.

Management of Revenue Moneys

For most bands, the bulk of revenue moneys come from the leasing of land. Under the current *Indian Act*, only DIAND is legally authorized to lease land and to collect lease moneys; the Act does not enable bands to collect revenue moneys directly. Bands or individuals who possess reserve land holdings and wish to lease the land must, therefore, ask the Minister to do so on their behalf.

In an effort to exercise more direct control over their lands and eliminate delays caused by departmental involvement in leasing, some bands and individuals have resorted to 'buckshee' leases. This practice is not recognized under the Act and the leases are not registered with DIAND. Since the title to reserve land is vested in the Crown, if a dispute arises with a lessee under a buckshee lease, the lease is not legally enforceable. This lack of protection for Indian interests emerged as a significant concern during Phase II of the Review.

As well, the practice of transferring revenue moneys to a band without a clear indication that the moneys will be used for the benefit of the band is contrary to the Minister's trust responsibilities under the Act. In his 1986 report to Parliament, the Auditor General indicated that DIAND must either amend the Act to enable bands to assume full responsibility and accountability for their revenue moneys, or put in place a monitoring regime to assure the Minister that the moneys are being properly managed. Clearly, by increasing departmental controls over band spending, the latter proposal would be contrary to band wishes and the government's policy of self-government.

Options for Change — Four Scenarios

"Any changes to the Indian Act must take into account the different circumstances of First Nations."

During Phase II of the Lands, Revenues and Trusts Review, a full range of options were developed to address the many concerns and issues that have emerged in regard to capital and revenue moneys. These options were developed by the consultants working on the moneys project, in close consultation with bands and departmental officials.

Four specific "scenarios" for change were identified. They range from maintaining the status quo in terms of Ministerial authority and responsibility for Indian moneys, to transferring complete authority over moneys to bands with no continuing involvement by the Minister.

Scenario 1 — Maintaining the Status Quo

SYNOPSIS

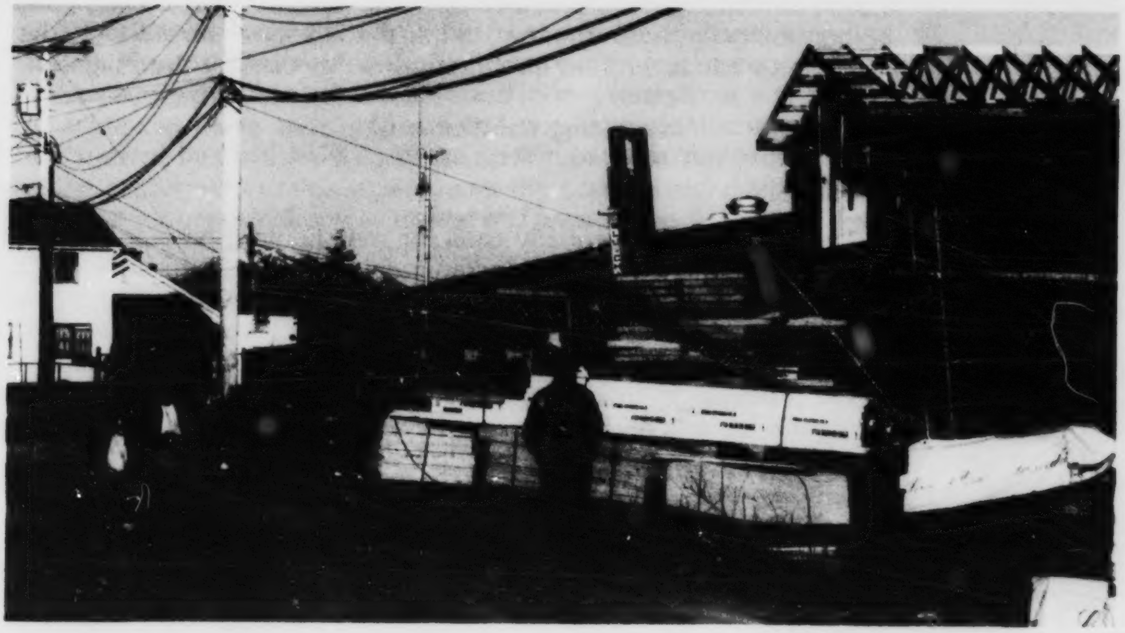
Scenario 1 essentially calls for maintaining the status quo in regard to the management of Indian moneys with the Minister continuing to act in a trust-like role. No legislative changes would be required in the area of capital moneys. However, DIAND would pursue closer working relationships with bands and encourage individual bands to develop long-term money management frameworks that reflect their goals and aspirations. In the area of revenue moneys, legislative change would clearly be required to legitimize many current band practices.

CAPITAL MONEYS

During Phase II discussions, some First Nations expressed a strong desire to continue to operate under the provisions of the current *Indian Act*, at least for the time being. This is largely because of the security provided by the existing regime (e.g., their money is not at risk, there are no management or administrative fees, their assets are liquid, the money is treated as tax-exempt and a reasonable rate of return is guaranteed).

Scenario 1, therefore, does not involve any amendments to the *Indian Act* or changes in the Minister's obligations for capital moneys. However, during Phase III First Nations will be consulted on the management improvements outlined earlier. The establishment of closer working relationships between bands and DIAND and the development of a long-term framework that gives life to the goals and aspirations of a band should go far in eliminating unnecessary delays and confrontations.

It should also be understood that even within the constraints of the existing legislation, bands have the authority to deal with a range of problems in a manner that respects the Minister's role and responsibilities. For example, some band councils have expressed the need for clear direction from band members on how capital moneys should be used. Others have indicated that some Indian communities are being torn apart by conflicting demands on capital moneys and the lack of a framework to guide band councils in spending these moneys. As well, a growing number of band members are becoming concerned about their accountability to their children and grandchildren. These and other issues can be dealt with by individual bands under the current *Indian Act* regime.



REVENUE MONEYS

Legislative and regulatory change would, however, be required to legitimize the current range of band practices in managing revenue moneys. These practices vary significantly from the regime provided for under the *Indian Act* and related regulations.

For example, while many bands have been granted authority under Section 69(1) of the Act to "control, manage and expend" revenue moneys, departmental scrutiny of these expenditures has been minimal. As well, a number of bands are involved, without legal authority, in collecting revenue moneys from leases and permits. DIAND has no control over these funds and, therefore, is unable to assure band members or the Minister that the moneys have been spent for the benefit of the band (as required by the Act).

This issue could be addressed by providing bands with the option of assuming complete control over the management of revenue moneys. To achieve this, a mechanism could be created (probably through amendments to the *Indian Act* and the *Indian Band Revenue Moneys Regulations*) which would:

- enable bands to collect revenue moneys on their own behalf and on behalf of members who are locatees (i.e., a band member lawfully in possession of reserve land); and

- eliminate the requirement that band expenditures of revenue moneys must conform to Section 66 of the Act, which provides for some degree of control by the Minister. Without this change, bands may be required in future to provide budget or formal expenditure requests before the Minister can release revenue moneys.

Such a legislative regime would recognize the authority of a band to make decisions on how its revenue moneys will be spent. The band council would be accountable to band members for its spending decisions and the Minister would be completely removed from the process.

Scenario 2 — A New Framework for Investments

SYNOPSIS

Scenario 2 proposes that investment funds be created for holding some or all of a band's capital moneys outside the Consolidated Revenue Fund (CRF). These funds would be managed by trust companies or a board of trustees acting as agents of the Minister. This approach would provide a mechanism for achieving higher rates of return than are now provided by the CRF, but would also involve greater risks. While it is possible that this scenario could be implemented under the existing legislative base, it might be useful to amend the Act to provide the Minister with the clear authority to remove moneys from the CRF and create an agency relationship for the management of these moneys.

POTENTIAL RATES OF RETURN

During the course of Phase II, a number of bands expressed concern about the rate of interest paid by the federal government on Indian moneys held in the CRF. Interest paid on these moneys is based on the quarterly average market yield of Government of Canada bonds with 10 years or more to maturity. This formula is set by regulations under the *Financial Administration Act*.

Despite these regulatory requirements, many First Nations have pointed out that interest rates paid on Government of Canada bonds are generally lower (because of the government's strong credit rating) than on other investments which a private sector trustee would be expected to consider. For example, between 1970 and 1988 average market yields for selected investments were as follows:

Long-term federal government bonds	9.76 per cent
Long-term provincial government bonds	10.62 per cent
Long-term corporate bonds	10.88 per cent
NHA insured mortgages	11.35 per cent

However, even with higher potential rates of return from other investment options, the CRF is a relatively attractive place to hold funds in the short term and may, therefore, be a preferred vehicle for revenue moneys. This is because the interest rates paid by the CRF are likely to exceed those available in the market for short-term securities such as treasury bills. They are also fully indexed to increases (and decreases) in interest rates. As indicated earlier, the balance in the account is secure and completely liquid, interest earned is tax-exempt and there are no management or administrative fees.

On a long-term basis, the CRF may be less attractive. Differences in rates of return between federal government bonds and other relatively secure investments can mean significant amounts of money over time, or even more immediately if the band is attempting to meet current expenses out of income. For example, based on the formula now in use a band with $100 million invested in the CRF from 1970 to 1987 would have received an average of $9.74 million per year in interest income. Over the same period, $100 million invested according to the average rate on new NHA insured mortgages would have provided an average annual return of $11.34 million — an additional $1.6 million per year (although this figure does not take into account any administrative charges that would be forthcoming).

While other types of investments are available (such as stocks, real estate and venture capital), they are riskier than bonds or mortgages and generally do not provide as much income in the short term. However, they offer the potential for much greater capital appreciation and, therefore, higher returns in the long term. The appropriate balance between risk, immediate income and prospective return would depend on the financial situation of different bands and the long-term strategies that a band might wish to adopt.

One method of putting a band's capital moneys into a more diversified and potentially more profitable investment portfolio would be for the Minister, at a band's request, to establish a trust fund outside the CRF. At the same time, it must be recognized that such a structure would carry with it a degree of risk not present under the current *Indian Act* regime.

FUND MANAGEMENT — TRUST COMPANY MODEL

The simplest method for implementing the trust fund concept would be for the Minister to enter into an agreement with an established trust company to act as his/her agent for the purpose of investing some or all of the capital moneys of a particular band. This would only be done with the consent of the band. A number of variations are possible, but key characteristics of such an arrangement are described below.

- The band council and the Minister would determine how much of the band's present and future capital moneys should be placed in a trust fund for investment purposes. The Minister would then transfer these moneys to the trust company. The band might begin by placing a limited portion of its moneys in the investment fund, gradually increasing the amount if it was satisfied with the arrangement.

- Investments would be made by the trust company in accordance with a program and strategy approved by both the Minister and the band council. Such a strategy could, for example, specify maximum percentages of the fund that could be invested in various types of assets, such as stocks, bonds, agricultural land, other real estate and business ventures.

- In developing the investment program, the Minister and the band council would take into account limitations imposed by provincial trustee or federal pension legislation. However, they might want to be less restrictive than this legislation in directing investment in certain types of assets (such as undeveloped land and certain types of stocks), while at the same time providing more specific guidance to the trust company in other areas (for example, in expressing a preference for on-reserve mortgage lending).

- The investment program would probably be based solely on normal investment criteria. Projects pursued on the basis of their broader socioeconomic benefits (such as on-reserve employment) could be accommodated through the use of revenue moneys or capital moneys left in the CRF.

- Under its agreement with the Minister, the trust company could be required to consult with the band council (or an investment committee established by the band council) in advance of making certain types of investments, or when the proposed investment exceeded a certain dollar amount.

- DIAND would not be involved in decisions on specific investments. However, the Minister would be responsible for monitoring the performance of the investment fund and ensuring the terms of the trust were met. As well, the Minister would have the authority to order the funds to be returned to the CRF if the approved investment program was not being followed or the rates of return were unsatisfactory in comparison to those received under the CRF.

- The trust company would report periodically to the Minister and the band council on the investment portfolio and its performance. The fund would also be subject to audit on an annual basis.

- Interest and dividend payments from investments could be paid directly to the band and, like the profits on business ventures carried out using capital moneys, would not be considered Indian moneys under the terms of the *Indian Act*.

- The trust company would have the authority to buy and sell securities but the proceeds of any sale would be returned to the fund for reinvestment.

- The trust company would have no authority to make any expenditures other than investments. Under the trust agreement, at the request of the band council the Minister could be empowered to withdraw a portion of the funds in the trust. The trust agreement might limit such withdrawals to specific purposes or circumstances, such as an emergency.

- The fees and expenses of the trust company would be paid from the fund.

FUND MANAGEMENT — BOARD OF TRUSTEES MODEL

A second option for managing Indian capital moneys outside the CRF would be to appoint a board of trustees to oversee the implementation of an investment program. While this would enable a certain degree of band involvement, local control would be limited by the fact that the trustees would be acting as agents of the Minister. They would have the authority only to invest capital moneys, not expend them any for other purpose. Key characteristics of this arrangement are outlined below.

- In consultation with the band council, the Minister would establish a framework under which the board of trustees would operate. Under this framework, the Minister would retain authority to revoke the trust and to require the funds to be returned.

- Mechanisms for appointing trustees would be specified in the framework agreement. While the band council would be responsible for naming the trustees, the agreement might require that all trustees have business experience or that the board include a certain number of non-band members with specified professional qualifications.

- The board of trustees would direct the investment of funds but would also likely require the services of money managers to carry out investment instructions, act as custodians of securities and perhaps provide investment advice.

- Procedures and limitations with respect to making investments and withdrawing money would be similar to those in the trust company model discussed above. As well, the fees and expenses of the trustees, and of any company or individual hired by them, would be paid from the fund.

LEGAL ASPECTS

A key consideration with both fund management models proposed in Scenario 2 is their compatibility with the present wording of the *Indian Act*. Some people believe that the Act could reasonably be interpreted to provide for the purchase of securities (for the benefit of a band) through a suitable trust or agency mechanism. Others argue that the Act should be amended to remove any doubt on this matter.

As previously indicated, the *Indian Act* does not specifically require that the band as a whole consent to expenditures of capital moneys. However, the prevailing view in Indian communities and within DIAND is that the establishment of a trust fund is an important decision, and that the band council should, therefore, ensure that its members are aware of and understand the proposal. With this in mind, the desirability of seeking consent through a band vote might be considered as a prerequisite to establishing a trust fund.

MINISTERIAL RESPONSIBILITY AND ACCOUNTABILITY

As indicated earlier, the parameters within which a trust fund would operate would be established through an agreement between the Minister and the trust company or the board of trustees. While this agreement could provide for varying degrees of band involvement in specific decisions, it should also be recognized that the Minister's trust-like responsibilities would be essentially the same as they are currently.

ADVANTAGES

The primary advantage of investing capital moneys through a trust fund arrangement would be financial in nature. In theory, access to a wider range of investments should enable bands to achieve higher annual rates of return in the long term than if the money was held in the CRF.

A second advantage would be the potential for a band to participate in investment decisions. The degree of involvement by band members would depend on whether a board of trustees was set up, as opposed to relying on a trust company to select the investments. For example, the naming of a board of trustees by the band would represent progress in terms of greater local control by Indian people. However, the trustees would be acting within a framework established by the Minister, and their authority would be limited by the terms of this agreement. Such a structure would not be unique; few beneficiaries have the experience and knowledge to participate directly in the operation of a trust. Scenario 2 could also be regarded as a stepping stone to Scenario 3 or 4, both of which would give a band greater control over both investment and expenditure decisions.

DISADVANTAGES

If a trust fund approach was adopted, First Nations would be required to pay for investment management services, whether they are provided through a board of trustees or by a trust company acting on its own. The exact cost of these services would depend on the amount of money to be invested, the nature of the responsibilities to be assumed by the trust company and the frequency and extent of band involvement. Nevertheless, these costs emerged as a concern during Phase II discussions with Indian communities.

A preliminary estimate of trust company fees for comprehensive services on an individual band's $100 million portfolio invested in marketable securities would be in the order of 0.25 per cent, or $250,000 per year. For a $5 million portfolio, the cost could be in the order of $30,000 (0.60 per cent) per year. These figures do not include the cost of an investment committee (should one be established to provide input to the investment manager) or the fees that may be charged by a trust company if it was required to meet frequently with such a committee.

However, the fees of a trust company or other outside advisors should be offset by higher rates of return, particularly for bands with multi-million dollar portfolios. Bands with smaller amounts to invest would need to consider some form of pooled fund, an option which is explored below.

There would also be setup costs associated with the establishment of a trust fund. Both DIAND and the band in question would have to apply human and financial resources to developing the concept and agreeing on the parameters within which the trust fund would operate. At the same time, it is likely that prototypes would be established that other bands could follow.

Perhaps the most obvious disadvantage to the trust fund approach is that a greater risk is likely involved than if the moneys were left in the CRF. Bands concerned about the risk factor would have the option of remaining under the current system.

APPLICABILITY TO FIRST NATIONS WITH LIMITED RESOURCES

To this point, the discussion of trust funds has been expressed in terms of individual bands whose financial resources would justify such an approach. While there is no hard-and-fast rule as to the level at which a separate investment fund would be cost-effective, this strategy would be most likely to appeal to bands with at least $5 million to invest.

Bands whose financial resources are more modest might find it cost-effective to participate in a pooled fund. For example, the Minister could authorize the establishment of one or more funds (each of which might hold different types of assets, such as equities or residential mortgages) to invest capital moneys from a number of bands. Under this approach, bands would ask the Minister to purchase on their behalf a defined number of units in one or more of the pooled funds. Dividend and interest income would be paid out to bands in proportion to their holdings. Units could subsequently be redeemed, with the funds being transferred to other funds or returned to the CRF. These pooled funds could be managed by a trust company, by trustees appointed by the Minister in consultation with participating bands, or by a Federal Indian Public Trustee (the concept of a Federal Indian Public Trustee is discussed in detail in the section of this chapter dealing with individual moneys.)

Scenario 3 — Indian Control through Trust Funds

SYNOPSIS

Scenario 3 calls for major changes to the *Indian Act* to enable bands to exercise more control over both investments and expenditures of capital moneys. This control would be exercised through trust funds established by First Nations. Most of the Minister's existing powers over investment and expenditure of capital moneys would be transferred to these trusts which would operate within limits set out in a trust agreement.

FIRST NATION TRUST FUNDS

During Phase II, the concept of First Nation trust funds emerged as a means of providing Indian communities with direct control over investments and expenditures of capital moneys.

Unlike the investment funds discussed under Scenario 2, First Nation trust funds would be established by the band council, not the Minister. This would require major amendments to the *Indian Act* and related regulations, both to give band councils this power and to authorize the Minister to transfer the band's capital moneys to a First Nation trust fund. Given the significance of such a measure, it is possible that one of the conditions for transferring moneys would be a band membership vote in support of the proposal. The amended legislation could also provide the option of a partial transfer of funds, although the fact that the trustees would have authority to approve expenditures as well as investments makes it logical for all of a band's moneys to be placed in the trust fund.

A trust agreement between the Minister and the band would establish how trustees would be elected or appointed. This agreement might, for example, require the appointment of several trustees who are not members of the band but who have the professional qualifications required to ensure the proper functioning of the board of trustees.

Under the agreement with the Minister, the board of trustees of a First Nation trust fund would undertake to act in the interest, and for the benefit, of the band. The trust agreement would provide a framework of rules, established primarily by the band itself, within which decisions would be made. In addition to these rules, an amended *Indian Act* might set out some basic controls, such as limiting investments to the same categories of assets currently permitted under pension or trust company legislation.

Under Scenario 3, the trustees would have the authority to encroach on the principal of the trust in response to expenditure requests from the band council. In assuming this power, the trustees would also take on the Minister's present obligation to determine whether proposed expenditures would be in the interest and for the benefit of the band. Criteria for expenditures would be developed primarily by the band but could require ministerial agreement under an amended Act. However, upon transferring the funds to the trust, the Minister would no longer be involved in, or accountable for, the approval of specific expenditures.

A number of options have been proposed for handling the issue of encroachment. For example, the power to encroach on the principal of the trust could be unlimited. Alternatively, it could apply only to income earned to a certain percentage of the principal, or to any balance in excess of a certain dollar amount, which might be regarded as a "heritage fund". As well, under the agreement with the Minister, the limits could change over time as the band gained experience in managing its own moneys.

To ensure that the interests of band members were protected under Scenario 3, there might be a need for limited governmental supervision of First Nation trust funds. This supervision would be similar to that currently exercised over trust companies, corporate pension funds and mutual funds (e.g., where the fund managers or trustees have primary responsibility for operating the fund and complying with the law). Indeed, this supervisory responsibility might well be given to the Superintendent of Financial Institutions, who has the expertise to perform such functions, rather than the Minister of Indian Affairs and Northern Development. Supervision would be carried out primarily through periodic reviews of audited financial statements and lists of investments. These reviews would ensure that the trust funds remained solvent and complied with any restrictions on their investments. The trustees might also be required to certify that expenditures are in accordance with the trust agreement. The Superintendent would intervene only if there was evidence that the fund was in financial difficulty or not in compliance with the trust agreement.

Consideration might also be given to enabling bands to collect their own capital moneys (although this is linked with the question of land titles and land management authority). Such a move implies legislative changes to the *Indian Act* and the *Indian Oil and Gas Act*, which now require that all capital moneys be collected by the department or other agents of the Minister. If bands were to collect their own capital moneys, First Nations with significant non-renewable resources might want to seek professional advice and assistance in selling these resources. This suggests that an organization similar to Indian Oil and Gas Canada would continue to exist, but only as an agent for the bands.

MINISTERIAL RESPONSIBILITY AND ACCOUNTABILITY

As previously indicated, under Scenario 3, First Nation trust funds would be established by bands and not the Minister. However, the Minister would have a role in establishing the trust agreements under which capital moneys would be transferred to the trust, as well as in approving any fundamental changes to such agreements.

If the *Indian Act* (and possibly other legislation) was amended to permit implementation of Scenario 3, the Minister would have no continuing involvement or responsibility for capital moneys held in First Nation trust funds. In particular, the Minister would no longer play a role in ensuring that the interests of individual band members were protected. This responsibility would fall to band members themselves, and would be exercised:

- through the appointment of trustees;
- by reviewing periodic reports from the trustees on the operations of the trust fund; and
- by filing complaints with the supervisory agency (i.e. the Superintendent of Financial Institutions) if there was evidence that the terms of the trust agreement were being violated.

LEGAL ASPECTS

With the degree of authority envisaged for First Nation trust funds under Scenario 3, the transfer of capital moneys from the Consolidated Revenue Fund would require an amendment to the *Indian Act* (as discussed earlier). This amendment would create broad enabling legislation that would provide the Minister and First Nations with the flexibility to tailor trust arrangements to the circumstances of individual bands.

ADVANTAGES

Scenario 3 represents a significant step toward increased Indian control of local affairs — and eventually self-government. DIAND's involvement would be restricted to the initial setup of the trust agreements, the transfer of funds and possibly the ongoing collection of capital moneys. In comparison with the proposals put forth in Scenario 2, the First Nation trust fund model offers important advantages for Indian communities, including:

- the naming of trustees by the band or band council, rather than by the Minister;

- greater flexibility for the trustees to establish their own investment program; and

- the transfer of authority to approve expenditures of capital moneys from the Minister to the trustees, subject to clear criteria.

Although DIAND would not be directly involved in managing the trust funds, the interests of individual band members would be protected through limits on the expenditure approval authority of trustees and through the supervisory role of the Superintendent of Financial Institutions. The Minister would be accountable only for the three functions outlined above (i.e., establishing trust agreements, transferring funds and collecting capital moneys), and not for the performance of the funds.

DISADVANTAGES

During Phase II of the Review, a number of potential First Nation concerns were identified with regard to Scenario 3. These included concern that:

- the First Nation trust fund option would continue to limit the power of band councils to make expenditures, even though this power would be exercised through trustees chosen by the band;

- the structuring and start-up of a First Nation trust fund could involve significant costs (e.g., fees for professional advice), over and above those which might be incurred on an ongoing basis;

- these costs might be paid for out of the capital moneys themselves;

- the level of risk would be much greater since the Minister would no longer play a role in ensuring that the interests of individual band members were protected; and

- the role of a trustee could involve potential conflict with the band council over the appropriateness of investments and expenditures.

APPLICABILITY TO FIRST NATIONS WITH LIMITED RESOURCES

To this point, scenario 3 has been discussed in terms of single bands whose financial resources would justify establishment of separate trust funds. As with Scenario 2, there is no hard-and-fast rule as to the level at which a separate fund would be cost-effective. However, it is believed that this alternative would be most likely to appeal to bands with at least $5 million to invest.

First Nations whose financial resources are more modest might find it cost-effective to pool their capital moneys in a single trust fund. Under such an approach, each participating band would likely have the authority to name one trustee to a joint board which would manage the investment portfolio. Each band might also establish a separate board of trustees for the purpose of investment approval.

At the same time, it should be kept in mind that difficulties might arise in achieving agreement among participating bands, particularly given the degree of discretion which the trustees would exercise with respect to investments. Prior experience in the type of pooled fund arrangement discussed under Scenario 2 might be a useful precedent for such collaboration.

Scenario 4 — Direct Indian Control

SYNOPSIS

Scenario 4 represents a complete transfer of authority over a band's capital and revenue moneys from the Minister to the band. As such, it is comparable with the money management terms of self-government agreements (e.g., along the lines of the *Cree-Naskapi (of Quebec) Act*.

Scenario 4 cannot be described in detail because it would be primarily up to individual bands to define and establish arrangements for managing their moneys. However, the transfer would likely require both enabling legislation at the federal level and band bylaws (or a band constitution) which would provide the framework for the collection, investment and expenditure of moneys derived from band assets, including land. While trust fund structures could be used to carry out these activities, the band council itself would exercise final authority over expenditures and investments. It is also likely that a band membership vote would be required to ensure that band members were supportive of the money management arrangements and direction proposed by the band council.

At the time of transfer, the Minister would be obligated to ensure that the band was capable of taking on complete responsibility for managing its moneys, and that the arrangements established by the band provided for the protection of individual rights. However, the Minister would not have any continuing involvement or accountability for the management of the funds.

Individual Moneys

"The Indian Act is paternalistic — it lets other people make decisions for our children/family members."

Background

As indicated at the outset of this chapter, DIAND is responsible under a variety of circumstances for holding moneys on behalf of individual Indians. These moneys may be held in one of the following accounts:

- *Minors'* savings accounts contain the funds of Indian minors, including funds from per capita distributions (commonly referred to as PCDs) and inheritances. These funds are held until the individual reaches the age of majority.

- *Guardianship* accounts contain the funds of Indian minors that are transferred from a savings account when the minor is not under the general care and custody of his or her natural parents.

- *Adopted children's* accounts contain the funds of Indian minors adopted by non-Indians.

- *Missing heirs/individuals* accounts contain the funds of heirs to an estate or other band members (adult or minor) who cannot be located.

- *Mentally incompetent* accounts contain the funds of Indians certified under provincial law to be unable to conduct their own affairs.

As of October 31, 1989, DIAND maintained approximately 20,000 individual accounts containing a total of $160 million (the balance in many of these accounts is small, with more than half containing less than $250). Much of the money held in individual accounts comes from PCDs made by bands from their capital moneys. However, bands are now making PCDs primarily out of revenue moneys, as well as establishing their own arrangements for the guardianship of the resulting minors' funds. These trends would seem to indicate that the dollar value of individual accounts maintained by DIAND will decline.

Current Management Regime

Section 51(1) of the *Indian Act* vests all jurisdiction and authority in relation to the property of mentally incompetent Indians in the Minister. It authorizes the Minister to appoint persons to administer such property, and to make orders and give directions to these administrators. Section 52 of the Act authorizes the Minister to "administer or provide for the administration of any property to which infant children of Indians are entitled, and. . . appoint guardians for such purpose."

DIAND maintains trust accounts on behalf of minors and mental incompetents to hold funds that are already in the department's hands when they become payable to such individuals. For example, trust accounts are established for minors who belong to bands that make per capita distributions from capital moneys or who inherit from Indian estates administered by DIAND (see *Estates*). Funds are rarely deposited to these accounts from other sources or parties. This reflects the department's view that it is not the guardian of any and all property of Indian minors, but only the administrator of those funds which are in its possession for other reasons.

For example, bands which make PCDs from revenue moneys do not generally forward minors' shares to DIAND for deposit in trust accounts. In some cases, band councils may be acting as trustees. In fact, legal counsel to the LRT Review have indicated that it is primarily the responsibility of the band council (and not DIAND) to ensure that PCDs from revenue moneys are properly managed on behalf of minors. This is true whether the council acts as trustee or entrusts the funds to another individual or organization on behalf of the minors.

The Minister rarely appoints non-departmental guardians for the property of minors, although parents may occasionally be appointed as co-guardians with DIAND employees. While there have been few legal interpretations in this area, it is considered likely that provincial guardianship law applies to Indian minors, except to the extent that the Minister administers the property or has appointed guardians.

To the extent that DIAND administers the property of an Indian minor, the Minister is held to the same trust-like duties and responsibilities that apply to guardians under provincial law. However, in exercising his authority to appoint outside administrators the Minister would be acting judicially and would not be liable.

Individual Indian moneys are considered to be public moneys under the *Financial Administration Act* (because they are administered by officials of DIAND) and are, therefore, held in the Consolidated Revenue Fund. Although individual moneys are all held in a single fund, the department's Trust Accounting System (TAS) is used to track the balance relating to each individual — in effect maintaining a "bank account" for each individual. As previously indicated, interest is credited to accounts twice a year at a rate determined by the average market yield to maturity on long-term Government of Canada bonds.

Bill C-123

Bill C-123, which was passed by Parliament in August 1988, amended the *Indian Act* to provide the Minister with general authority (under section 52.2) to make payments to parents or guardians on request if "in the opinion of the Minister, the payment or application is necessary or proper for the maintenance, advancement or other benefit of the child." This legitimized a practice which had, in fact, been ongoing for some time. To receive such payments, parents must apply to the department and justify their requests for funds.

Bill C-123 also provided a framework whereby band councils can authorize that a portion (up to $3,000 per year) of a minor's PCD be paid to the parents or to any other person who is responsible for the care and custody of the child. These amounts do not pass through the minor's trust account maintained by DIAND.

Problems Identified by Indian Communities

During Phase II consultations, a number of concerns were expressed by Indian communities with regard to DIAND's management of individual accounts.

For example, in cases where minors' funds are held by the department, Indian parents feel they have not had the same opportunities as non-Indian parents to act as guardians of their children's property. This is due in large part to the manner in which DIAND has interpreted and applied the *Indian Act*. As well, Indian parents are concerned that information is not readily available on the circumstances under which money will be released for the maintenance, advancement or benefit of minors and mental incompetents. This has caused difficulties and delays in obtaining these funds.

Indian parents and community leaders also pointed out that:

- interest rates paid on moneys held in the CRF are lower than might be obtained from some other investments, such as corporate bonds or residential mortgages;
- interest is not paid on accounts held for missing persons; and
- formal certificates of mental incompetency have not been obtained for some Indians whose funds are managed by the department.

Options for Change

GREATER INVOLVEMENT OF FAMILY MEMBERS

Administration of the property of minors and mental incompetents is fundamentally a private matter. It is of concern primarily to the beneficiaries and their families, rather than to the community as a whole. As a result, in non-Indian society, it is considered normal for parents or other family members to act as guardians, particularly for the property of minors. Exceptions are rare but may arise if the sum is so large that the parents cannot post an appropriate bond (as might happen in the case of lottery winnings) or if there are other reasons to question their ability to act as guardians.

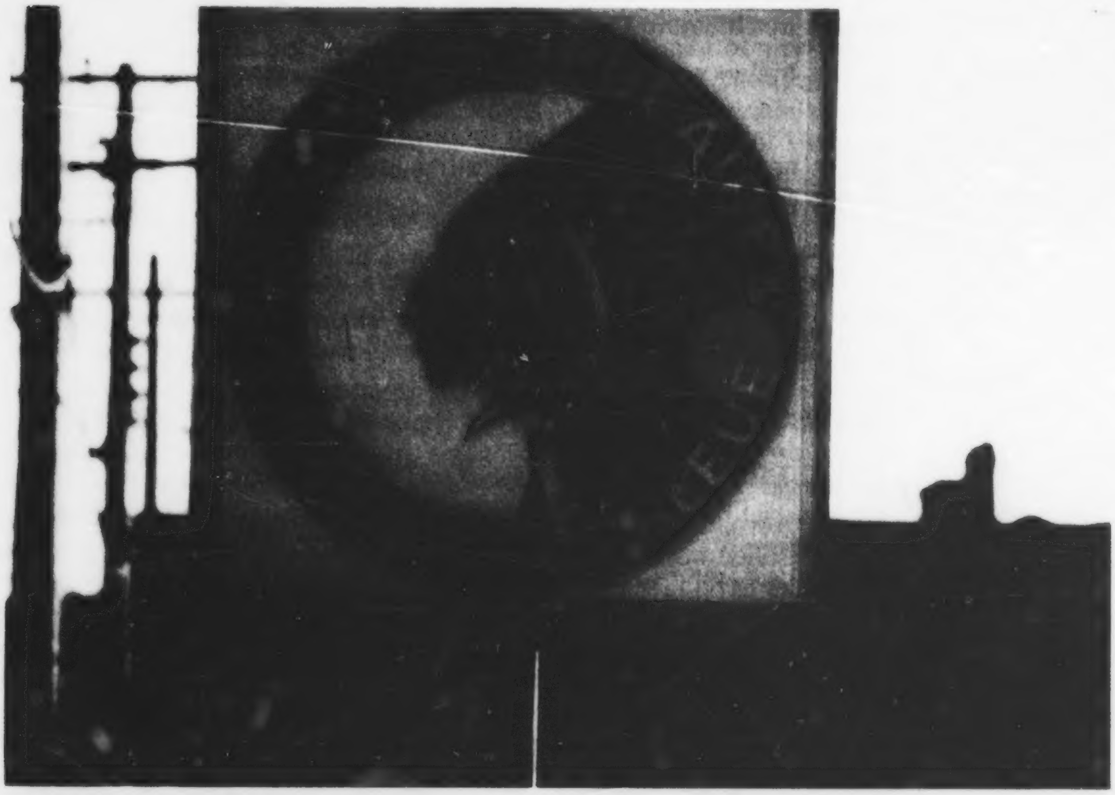
Sections 51 and 52 of the *Indian Act* clearly authorize the Minister to appoint parents or other family members as guardians. However, while there is no explicit policy against such appointments, they are rarely made. As well, DIAND has no documentation on the process of appointing a parent as guardian or on a guardian's responsibilities. As a result, the Minister administers property on behalf of a significant number of Indian minors.

To make possible the greater involvement of family members in administering trusts for minors and mentally incompetents, DIAND is:

- developing policies and procedures for appointing non-departmental guardians. These could include bonding requirements for accounts larger than \$3,000 (the maximum amount that can be paid annually to parents from a minor's PCD of capital moneys);

- developing information material for prospective guardians on the appointment process, a guardian's responsibilities and how these responsibilities might be carried out; and

- clarifying that the Minister could authorize parents acting as guardians to make expenditures from a minor's funds for the maintenance, advancement or other benefit of the minor. This authority would probably be the most attractive aspect of taking on the responsibility of guardianship.



INVOLVEMENT OF TRUST COMPANIES

With regard to some of the larger individual accounts maintained by DIAND, parents or other family members may not be in a position to assume the responsibilities of guardianship. This is both because more sophisticated investment expertise is required and because it would be reasonable for the Minister (or a court) to require that a bond be posted by guardians. Commercial bonding services are difficult to obtain on-reserve.

For these larger accounts, the Minister could appoint trust companies as guardians as a potential means of achieving higher rates of return. A process for such appointments is discussed below.

- As a first step, departmental officials would consult with the councils of bands whose minors have substantial amounts of money in DIAND-maintained trust accounts on the potential involvement of trust companies. It might be appropriate for the department and the band council to seek input from parents at this stage, as well as later in the process.

- If the band council concludes that a significant number of parents would be interested, trust companies could be identified that might be capable of providing the relevant services. Proposals would be requested from each trust company setting out their experience, the arrangements that would be put in place for the management of minors' funds, and the fees that would be charged.

- A preferred trust company would be selected by the department in consultation with the band council, and a framework agreement would be drawn up between the Minister and the trust company. The agreement would include any limitations on how minors' funds could be invested.

- In collaboration with the band council, DIAND would notify parents of its intention to appoint the trust company as guardian of that portion of their children's property held by the department. At this time, the arrangements made with the trust company would also be explained. If the parents concurred within a specified period, the trust company would automatically be appointed by the Minister.

- Requests from parents for payments for the maintenance, advancement or other benefit of the child would continue to be received and reviewed by the department, with the Minister authorizing the trust company to release funds as appropriate.

FEDERAL INDIAN PUBLIC TRUSTEE

Even if family members and trust companies assume responsibility for many individual accounts, the department will retain some accounts that are too small to be of interest to trust companies and others where no family member is willing or able to act as guardian.

In the non-Indian context, provincial public trustees take responsibility for such accounts. In the Indian context, a similar institution — perhaps called a Federal Indian Public Trustee — could be established to administer individual accounts and assume estate administration responsibilities (see *Estates*).

The establishment of a Federal Indian Public Trustee would provide numerous opportunities for greater Indian involvement in the administration of individual accounts. For example, Indians would be involved in the day-to-day operations of the institution, and would participate in a special committee established to direct the investment of funds held in individual accounts. In the long term, higher rates of return might be achieved through a wider range of investments.

While it is a promising concept, the establishment of a Federal Indian Public Trustee would require special legislation to be passed by Parliament. As a result, it would take longer to implement this proposal than to appoint family members and trust companies as guardians.

POSSIBLE FURTHER STEPS

Many of the changes discussed above relate to the day-to-day administration of individual accounts. None would fundamentally alter the legal framework within which this administration takes place. The latter could be achieved only through amendments to the *Indian Act*.

In this regard, consideration could be given to amendments which would:

- give bands the authority to establish their own rules governing the administration of the property of minors and mental incompetents; and

- transfer the Minister's judicial functions, such as the appointment of guardians, to an Indian court system if such a system is established in the future.

Moving into Phase III

In addition to addressing the short-term administrative issues discussed above, Phase III of the Lands, Revenues and Trusts Review will provide an opportunity for Indian communities and DIAND to work together to explore opportunities for increasing Indian authority over Indian moneys.

ESTATES

Overview

Most people have an "estate". An estate includes personal property, such as cars, furniture, boats and bank accounts, as well as interests in land and any buildings on the land.

To ensure that their estate is administered (i.e., property is divided) after death according to their wishes, many people also have wills. In addition to directing how the property is to be divided, a will names an executor. In effect, an executor acts as the personal representative of the deceased and is responsible for administering the estate according to the wishes of the deceased. An executor's duties include:

- preparing lists of the deceased's assets;
- collecting money belonging or owed to the deceased;
- determining who is entitled to a share of the estate, where they live and how much they should receive; and
- distributing the assets of the estate.

The executor of an estate is usually a member of the deceased's family or a friend. While the services of a lawyer are not essential, they are often used if the estate includes such assets as real estate or a business. If the executor named in the will is unwilling or unable to act, an estate administrator may be appointed by an appropriate court.

In the non-Indian community, provincial laws provide a framework for administering the estates of deceased persons who do not leave a will. Such cases are known as intestacies, and specific legislation in each province sets out rules for distributing the assets from these estates. As no executor is named, the court appoints an administrator, in most cases a family member or friend.

If no one is willing and considered capable by the court to act as administrator, the provincial Public Trustee is appointed to administer the estate. The Public Trustee is an official of the provincial government but usually has considerable autonomy in carrying out his or her responsibilities. Like a lawyer or trust company, the Public Trustee's office charges for its services to the extent that the value of the estate permits. Public trustee fees are generally in the order of five to seven per cent of the value of the estate.

In the non-Indian context, estate administration is supervised by surrogate or probate courts. When required, these courts:

- determine the validity of wills (where this is questioned) and rule on their construction;
- approve the appointment of administrators;

- approve the distribution of assets according to the terms of the will; and

- approve the payment of administration expenses from the estate.

The courts become involved in administering an estate only if the need arises. Such routine activities as transferring the registration of vehicles, transferring the title to land or closing out bank accounts can be carried out by an executor on his or her own authority.

Indian Estates

The *Indian Act* gives the Minister of Indian Affairs and Northern Development exclusive jurisdiction over the administration of the estates of deceased Indians who normally lived on-reserve. Where there is no will outlining the deceased's wishes, rules for the distribution of property are spelled out in the *Indian Act* and in the *Indian Estates Regulations*.

The writing of wills is not common among Indians, since a large segment of Indian society is characterized by oral tradition and informal recordkeeping. In fact, only about 10 per cent of Indian people have a will, which means that most Indian estates are administered according to the intestacy rules of the *Indian Act*. The Act does not recognize Indian custom with respect to the division of assets, with the result that the actual distribution of assets may be totally contrary to the deceased's wishes.

Under the *Indian Act*, the Minister has powers similar to those of a provincial surrogate or probate court; in the case of intestacies, he or she can appoint executors and administrators and authorize their activities. Estate administration costs are borne largely by DIAND, although some expenses, such as the cost of insuring the assets in an estate, are charged to the estate itself.

In the Indian context the appointment of family members or friends as executors or administrators has been limited. These duties have generally been carried out by DIAND officials, a practice which has involved departmental staff in issues that most people consider private, family matters.

Problems and Issues Identified by Indian Communities

While First Nations have not expressed significant concerns about the administration of estates, there is increasing recognition that, in this regard, the *Indian Act* is out of step with Indian aspirations. During Phase II of the Review, some First Nations suggested that the present system of estate administration requires examination. Among specific issues raised was the fact that the Act requires that the Minister approve a will before it has any legal effect. The Act also:

- prescribes how property will be distributed if an individual dies without stating his or her wishes;

- requires the Minister to appoint executors or administrators;

- does not recognize inheritance customs; and

- fails to take into account the circumstances surrounding individual estates.

The lack of a definition of custom adoption in the *Indian Act* was also seen as a problem. Children who are legitimately adopted according to Indian custom may be disinherited when one or both of their adoptive parents dies.

As well, some Indian estates are becoming larger and more complex as bands develop economically. DIAND officials and First Nation leaders both expressed concern that the Department may not be properly equipped to resolve the issues which arise in administering these estates. Moreover, the closure of many DIAND district offices has restricted contact between Indians and the Department at the community level. As a result, relationships do not exist which would facilitate the efficient administration of estates.

Finally, many Indian people are becoming more knowledgeable about estate matters and want to administer estates themselves. Band members returning to the reserve are often frustrated by the restrictions of the Act when they attempt to settle an estate.

As the number of Indians living on-reserve continues to grow due to natural population increases and the effects of Bill C-31 (see *Membership* chapter), the number of Indian estates that fall under the jurisdiction of the *Indian Act* is increasing. The issues identified above are, therefore, taking on greater significance in many Indian communities.

During Phase II of the Review, the estates project team:

- clarified the mandate and responsibilities of the Minister of Indian Affairs and Northern Development in relation to Indian estates;

- identified potential short-term improvements in DIAND's estate activities; and

- developed options for administering estates, with the emphasis on increasing local control by Indian people.

Options for Administering Indian Estates

First Nations have expressed a desire for more control over their own destinies, including the capacity and authority to administer the estates of deceased relatives, friends and band members.

During Phase II, a number of options were identified whereby Indians can gain more control over estate administration in the short term. The four options listed below, and discussed in greater detail elsewhere in this chapter, need not be seen as mutually exclusive:

- greater involvement of family members and friends as executors or administrators;

- access to estate planning information and tools;

- alternatives for "public trustee" functions, including greater band control, establishment of a federal Indian Public Trustee, and privatization; and

- band control of estate administration through legislative change.

Greater Involvement of Family Members and Friends

An increased involvement of family members and friends in estate administration would significantly lessen the intrusion by DIAND officials in the private affairs of Indian people. It would also:

- help ensure that information about a deceased's assets and the identity and location of potential heirs is made available;

- help assure those involved that the estate will be settled according to the deceased's wishes; and

- shorten the time period required to settle an estate.

While the *Indian Act* empowers the Minister to appoint a family member or friend as administrator of an estate, DIAND's bonding requirements have historically served as an obstacle to such appointments. The Department's policy on bonding stems from the fact that Section 89 of the Act protects Indian property from being seized to pay debts to non-Indians. This makes it difficult to get insurance or an administrative bond for Indians who wish to act as administrator of an estate. (Even in the non-Indian community, administrators are often called upon to post a bond, using their own assets, as a means of ensuring that the deceased's assets will be protected.) As a result of the difficulty on-reserve Indians encounter in obtaining bonding, family members have rarely, if ever, been appointed as sole administrators of an estate, although they have sometimes been appointed as co-administrators with departmental officials.

If an estate is small and the administrator is a family member, a financial bond may not be necessary. During Phase III, consideration will be given to the circumstances under which bonding should (or should not) be required, and the type and amount of the bond.

Another factor that has limited family involvement in estate administration is Indian peoples' general lack of familiarity with the process and the responsibilities involved. As indicated earlier, these responsibilities include:

- preparing an inventory of the deceased's property;

- safeguarding assets and collecting moneys due or owing;

- arranging for advertising for creditors, heirs and other claimants; and

- distributing assets of the estate.

Currently, little information exists for family members wishing to act as executors and administrators. Access to such information would relieve some of the concerns individuals may have in taking on estate administration responsibilities.

DIAND recognizes that a number of measures can be taken to encourage and facilitate greater involvement of Indians in estate administration. In this regard, manuals will be prepared to guide administrators/executors through difficult or potentially controversial estate administration issues. In cooperation with interested First Nations, information and self-help materials will also be developed. During Phase III of the Review, the views of First Nations will be sought on the suitability of such materials as:

- a video describing the steps involved in the administration of a simple estate;

- a brochure outlining how executors or administrators are named, their responsibilities, and when the expertise of specialists (such as lawyers) might be required; and

- user friendly forms for use by executors or administrators.

Access to Estate Planning Information

Estate planning is simply the process of organizing your affairs so that after death your property is divided according to your wishes. However, while most people know how they want their worldly goods divided, not everyone takes steps to ensure that their wishes will be followed. Writing a will provides the best safeguard.

In addition to ensuring that an individual's wishes are followed, in the Indian context a will can:

- ensure that family or tribal customs are respected;

- eliminate significant departmental involvement in administering the estate;

- reduce family and/or community disputes;

- speed-up the settlement of estates; and

- alleviate problems associated with the passing of land, which is often the most contentious issue in settling an estate.

During Phase III, DIAND will work with interested communities to develop effective estate planning tools.

Alternatives for Public Trustee Functions

Even with the greater involvement of family members and friends in estate administration (as proposed in the first option), there will be instances where no one is willing or able to take on the responsibilities of an administrator. In such cases, an "administrator of last resort", similar to a provincial public trustee, will be required. To date, these functions have been carried out by DIAND. However, a number of alternatives exist for consideration by First Nations.

GREATER BAND CONTROL

Some bands and tribal councils, including several that participated in Phase II consultations, have contribution agreements through which they assist the Department in administering estates. The activities carried out by band and tribal council staff include:

- providing DIAND with notice of the death of a band member;

- identifying the next-of-kin;

- determining whether the deceased left a will; and

- preparing an itemized inventory listing the deceased's property.

However, in addition to the above, it may be possible for bands and tribal councils to assume the full range of estate administration functions. These include:

- safeguarding assets and collecting moneys due or owing;

- arranging for advertising for creditors, heirs and other claimants;

- reviewing the validity of claims;

- arranging for the sale of assets;

- meeting with heirs to obtain agreement on the distribution of assets, and obtaining quit claims/releases as required; and

- obtaining all certificates or releases required by law.

Such increased band involvement would recognize the reality that DIAND is increasingly less present at the district level, and that First Nations are better placed to expedite the settling of estates. It would also enable communities to incorporate their own views and traditions into estate administration. For example, if band members share a common view on how land should be passed on, these practices could be reflected in wills.

In appraising this option, however, the cost factor must be taken into consideration. While most bands would be required to administer only a limited number of estates each year, significant costs could be incurred in providing employees with at least a minimum level of training and experience. Another important consideration will be the extent to which bands wish to become involved in estate administration.

To address these concerns, during Phase III of the Review efforts will focus on defining the responsibilities First Nations wish to assume, as well as the financial and training arrangements that will be required. With this in mind, some of the bands or tribal councils already involved in estate administration might serve as pilots for a more comprehensive transfer of responsibility.

FEDERAL INDIAN PUBLIC TRUSTEE

Another alternative to DIAND involvement in estate administration would be to establish a Federal Indian Public Trustee (FIPT) under new legislation. The FIPT would operate independent of DIAND, with full legislative authority to administer estates, but could continue to report through the Minister.

Under this scenario, Indians could be recruited and trained to staff the office of the FIPT. While this option would not represent a move toward greater local control of Indian affairs (or self-government), it would provide an opportunity for increased Indian involvement in estate administration and therefore more sensitivity to Indian concerns.

By establishing a FIPT, DIAND would ensure that Indian people can benefit from a model that has proven successful at the provincial level, without bringing Indians under provincial jurisdiction. The involvement of DIAND officials in the affairs of Indians would be significantly reduced, but the rights and protection enjoyed by Indians under the current Act could be maintained explicitly in the new legislation.

PRIVATIZATION

A third way in which the public trustee function could be carried out would be under contract to trust companies or lawyers, whose fees would be paid out of the estate (trust companies have expressed little interest in this proposal). However, the low dollar value of most Indian estates is a major obstacle to this approach. Preliminary calculations indicate that, on a national scale, the costs which DIAND now incurs for estate administration are 40 times greater than the fees which might be derived from these estates. Nevertheless, if the number of Indian estates with significant assets increases in the future, this option may become more feasible.

CONCLUSION

Each of the three scenarios discussed above represents a modest change in the status quo. DIAND would continue to be involved but there would be more emphasis on the appointment of Indians as administrators, and less on administration of estates by the Department itself. Significant legislative change would not be required, and the Minister would retain his/her judicial or supervisory powers as provided for under the current *Indian Act*.

Band Control through Legislative Change

During Phase II discussions, one other significant option emerged whereby bands can assume greater control of estate administration. This option would involve legislative change to enable bands or tribal councils to establish their own rules for estate administration.

Under this scenario, Indian communities with accepted property inheritance or distribution customs could incorporate these into their estate administration rules. As well, permitting bands to opt out of the estate administration provisions of the *Indian Act* (in favor of their own rules) is consistent with the goals of facilitating local control at a pace established by individual communities.

While some First Nations have expressed an interest in developing their own legal framework for estates, it should be recognized that the powers of bands to establish such rules would be subject to certain limitations. For example, tribal customs may have to be reconciled with the gender equality provisions of the *Charter of Rights and Freedoms*. As well, the right of individuals to draft wills that might be contrary to a band's customs would have to be protected.

Interim Departmental Initiatives

Based on recommendations made by the estates project team during Phases I and II of the Review, DIAND has already launched a number of initiatives to strengthen its estate administration activities. Apart from improving the Department's operations in the short term, several of these initiatives provide a base for increasing the involvement of family members/friends or band administrators in estate matters.

In particular:

- the Department is developing a standardized reporting system for estate administration activities. This system will permit DIAND to identify the type of issues that delay estate settlements, and to determine whether there are sufficient staff in the estates unit to handle the work load;

- a manual outlining DIAND's estate administration procedures has been published and distributed to estates staff at all levels of the Department. The manual will be updated on a regular basis to reflect new policies and procedures as they are developed;

- outstanding policy issues have been identified in the estates area, and are being addressed on a priority basis;

- a checklist and flow chart are being developed to help field officers perform their daily duties. It is anticipated that this material will be modified for distribution to family members and friends who may act as executors or administrators of Indian estates in the future;

- two levels of estate administration training courses have been developed and offered to departmental staff on a pilot basis in several DIAND regions. The Level I course has been modified and is being delivered to band representatives on a pilot basis; and

- a presentation emphasizing the benefits of estate planning has been prepared and delivered to staff from several bands. Based on this initial effort, a revised presentation will be available to other interested band members on request.

Moving into Phase III

During Phase III of the Review, work in the estates area will focus on developing mutually acceptable means of transferring estate administration from DIAND to Indian communities. This will be done in close consultation with Indian bands. Any measures adopted as a result of Phase III work will be optional in nature, with change proceeding at a pace determined by Indian bands.

FIRST NATION LAW

"The bylaw concept and the bylaw items in the Act seem to come from someone else and be for someone else. Why should we make a law based on someone else's law? We want to make our own laws and have them recognized by both the federal and provincial governments."

Band Councillor
LRT Review Meeting
Sakimay, Saskatchewan
September 27, 1988

Overview

In Canada, governments at the federal, provincial and local levels are given the task of working on behalf of their constituents to achieve basic economic, social and cultural objectives.

The authority to enact and enforce laws, often referred to as governmental powers, is the most important way for governments to achieve their objectives. This is as true for Indian governments as it is for any other government.

Under the current *Indian Act*, Indian band councils have the authority to make bylaws in specified areas to regulate community affairs, to generate revenues and to ensure that community members receive certain services. For some time, First Nations have expressed frustration with the scope and range of their law-making authority which they consider to be ill-defined, inadequate and obsolete.

For example, First Nations have the authority under the Act to make laws for the preservation, protection and management of fish and other game on a reserve. However, courts have ruled that this authority does not give bands the power to regulate the sale of fish. Indian community leaders view this as a serious limitation, especially at a time when First Nations are striving to become economically independent. In another example, the *Indian Act* does not provide band councils with any authority to enact laws in the area of environmental protection, a matter of extreme importance to Indians.

In fact, during Phases I and II of the Review, Indian community leaders emphasized that the principal problem with their law-making powers, as defined under the *Indian Act*, is that the bylaw approach was never developed or made applicable from an Indian community perspective. In this regard, bands do not feel that the bylaw concept provides them with the means to:

- make laws that fit their circumstances;
- make decisions that benefit their communities;
- control their daily lives and their future; or
- incorporate, as appropriate, traditional values and customary law.

As well, there is profound disagreement with any comparison of First Nation law-making authority to municipal government powers. Indian bands believe they have their own basis of law, and in fact are seeking powers of a provincial rather than a municipal nature. "First Nations — not municipalities" was a common theme raised in Phase II discussions.*

In order to exercise their law-making authority, all governments must also have a clear statement of their authority to enter into business and legal arrangements with other governments or legal entities. For example, carrying on government activity involves entering into contractual arrangements, the acquisition and disposal of property

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* In recognition of these concerns, the title for this project area was changed during the final stages of Phase II from BAND BYLAWS to FIRST NATION LAW.

(including land), the borrowing and investing of money and other activities necessary to fulfill a government's duties to the community it represents. This authority is commonly referred to as legal status and capacities or legal powers.

Under the current *Indian Act*, the legal status and capacities of Indian bands and their governments are not adequately stated. Nor has the question been clarified in any satisfactory way by the courts. The uncertainty that this creates has been a major impediment to band initiatives. Indian communities noted during Phase II of the Review that it is impossible for their governments to function effectively without a much clearer legal statement of their authority to act. For example, Indian governments noted the difficulties they have experienced in labour relations matters and in entering into agreements with municipal governments for the provision of essential community services as two of the more obvious implications of the absence of a clear statement of their legal status and capacities.

In addition to the above, all governments require a variety of administrative structures and mechanisms in order to carry out their duties. For example, mechanisms are required to:

- enforce laws made by the government;

- deliver services, many of which can only be provided through cooperative ventures with regional, provincial or national organizations; and

- ensure an appropriate balance between collective community rights and the rights of the individual.

Indian community leaders have consistently argued that under the existing *Indian Act* regime, many of the law-making powers that First Nations have, however limited, cannot be effectively used because of the absence of such an administrative infrastructure and the resources necessary to support it. For example, these leaders have frequently pointed to the inadequacies of existing mechanisms for the enforcement of First Nation laws on reserves.

Issues and Options for Change

During Phase II of the Lands, Revenues and Trusts Review, several specific issues were identified by Indian communities that, in their view, can be resolved *only* through a new First Nation law-making concept that reflects Indian needs, circumstances and aspirations. These issues are:

- the need to clarify and expand the range of First Nation law-making powers;

- the need to reduce or eliminate the applicability of provincial laws on reserves;

- the need for a more supportive and constructive role by the Minister in the First Nation law-making process;

- the need for mechanisms and resources to enforce First Nation laws and administer justice in a manner that is sensitive to Indian customs and tradition;

- the need for a clearer statement of the legal status and capacities of both the band and band council in matters related to the exercise of governmental power; and

- the need to clarify the relationship and decision-making authority of the band and the band council in important community matters, as well as to establish appropriate mechanisms for accountability.

Each of these issues is discussed in greater detail in the following pages of this chapter, together with an interesting range of options for change that have been identified by Indian communities to date.

First Nation Law-making Powers

"Legislation must be (raised to a) level of accommodating our uniqueness and providing us with the ability and freedom to proceed with our own affairs."

Band Councillor
LRT Review Meeting
Vancouver Island, British Columbia
September 22, 1988

"The federal government needs to make legislation enabling it to recognize Indian laws."

Band Councillor
LRT Review Meeting
Sakimay, Saskatchewan
September 27, 1988

Background

The law-making powers of band councils are set out in sections 81, 83 and 85.1 of the *Indian Act*.

Under Section 81 of the Act, band councils may pass bylaws related to such general matters as the health of residents on the reserve, the observance of law and order, the regulation of traffic and the purposes for which reserve lands may be used. These bylaws must be consistent with the *Indian Act* and any regulations made by the Governor-in-Council or the Minister pursuant to the *Indian Act*.

Section 83 authorizes band councils to pass bylaws on such matters as the licensing of businesses and the raising of money through taxation. Under Section 85.1 of the Act, a band council has the authority to make bylaws prohibiting the sale and the possession of intoxicants on the reserve.

A bylaw enacted for any of the purposes outlined in the Act usually applies to the reserve and anyone on the reserve, and is as much a law as any law passed by either the federal or provincial governments.

Problems Identified by Indian Communities

During Phase II of the Review, Indian communities identified three principal problems in regard to their law-making powers:

- the limited range of First Nation law-making powers currently provided for in the *Indian Act*;

- additional constraints placed on these powers by other sections of the Act and by related regulations; and

- the limited understanding of the jurisdictional force of First Nation bylaws.

LIMITED RANGE OF FIRST NATION LAW-MAKING POWERS

According to Indian community leaders, perhaps the most fundamental problem with the law-making powers as outlined in the current *Indian Act* is that many subject areas are:

- too narrow in scope;

- out-dated; or

- not present at all.

Indian communities emphasized in particular that Section 81 of the Act is completely out of step with any concept of providing them with control over local affairs or the capacity to work toward community objectives. The range of law-making powers under this section has remained virtually unchanged since the last major amendment to the *Indian Act* some 40 years ago. (The one exception was the passage in 1985 of Bill C-31, which, among other things, authorized a band council to control membership of the band and to pass residency bylaws.)

Under Section 81, the authority of band councils to pass bylaws is limited to specific subject areas, many of which are irrelevant to current circumstances. For example, while band councils have law-making powers over such minor issues as noxious weeds and beekeeping, no mention is made of several matters which are considered essential to the attainment of community objectives (e.g., environmental control, family law and child welfare).

During Phase II of the Review, Indian bands identified a number of subject areas where it was felt that the existing scope of their authority must be broadened to meet community needs and to enable them to take control over their affairs. Areas frequently cited in this regard include:

- increased authority to manage Indian lands, moneys and community infrastructures (e.g., housing);

- authority to control all aspects of health on the reserve;

- broadened authority over the maintenance of law and order, including express powers to provide for policing/enforcement of civil and certain criminal law matters;

- authority to establish their own rules and regulations related to the selection of their community leaders; and

- a clearer legal statement of the authority and capacity of the band and band council to enter into contracts, to borrow money and to use the assets of the band in the pursuit of community development opportunities.

First Nations also identified a variety of new powers which they felt should be specifically provided for in the *Indian Act*. These included such matters as:

- social services (including family matters and child care);

- the authority to control the development of renewable and non-renewable resources;

- environmental protection; and

- the administration of justice.

LEGISLATIVE AND REGULATORY CONSTRAINTS

In addition to the problems outlined above, a band council's law-making authority is further restricted by the fact that bylaws must conform with other provisions of the *Indian Act* and regulations made by the Governor-in-Council or the Minister pursuant to the *Indian Act*.

For example, many First Nations felt that constraints in those sections of the Act dealing with lands and moneys have significantly curtailed their ability to effectively pursue community development objectives. Using the example of Indian moneys, Section 64 requires that Indian bands must obtain the approval of the Minister prior to any expenditure of capital moneys for developmental purposes. In regard to Indian lands, the Act permits a band to lease land to non-Indians for developmental purposes but does not permit leasing to Indians. To take advantage of land-related economic opportunities, bands must comply with the complex and cumbersome leasing and surrender provisions of the *Indian Act*. Further, the Minister must actually lease the lands on behalf of the band. Bands have long held that this time-consuming process prevents them from taking advantage of economic development opportunities. (The full range of constraints related to lands and moneys are discussed under the *Land Management* and *Indian Moneys* chapters of this publication.)

In addition to the above, the *Indian Act* authorizes the Governor in Council to make regulations in a number of areas. Regulations generally are used to supplement legislation by defining administrative procedures, legal requirements and, in some cases, penalties in specified areas where uniform standards or controls are considered necessary. Under the existing Act, Section 73 empowers the Governor-in-Council to make regulations in four broad areas:

- environmental protection;
- health;
- public safety and order; and
- borrowing by bands.

Many of these overlap with the law-making powers provided under Section 81, and where conflicts occur with a band bylaw, the regulations take precedence. For example, traffic bylaws must comply with the Indian Reserve traffic regulations which in turn incorporate provincial traffic regulations.

In addition to Section 73, other sections of the Act authorize the Governor-in-Council to make regulations in such areas as elections and estates. The end result is that the powers of the Governor-in-Council to make regulations which take precedence over band bylaws seriously limits the capacity and effectiveness of Indian governments.

JURISDICTION

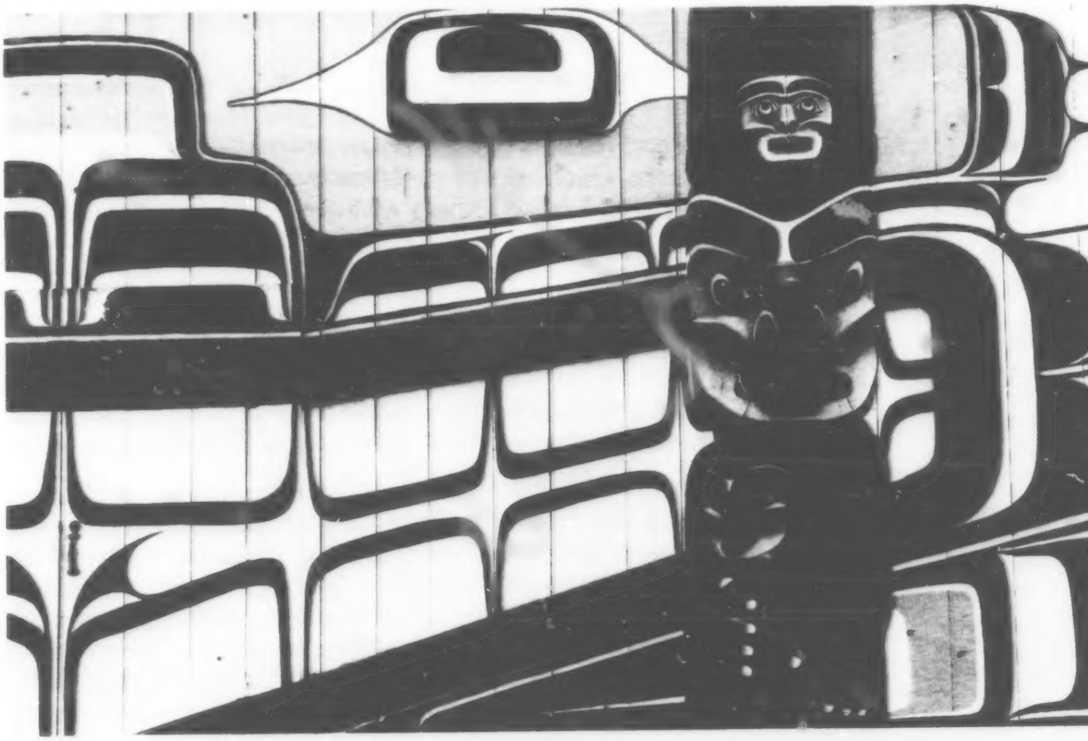
The limited understanding of the jurisdictional force of bylaws in comparison with provincial and federal legislation is another problem. (Jurisdictional force refers to the broadness or narrowness of a First Nation's law-making power and the extent to which any First Nation law will take precedence over other federal or provincial laws in the same field.)

Under the *Constitution Act, 1867*, there is a division of legislative powers between the federal and provincial governments. While Indian law-making powers fit into this framework under Section 91(24) of the *Constitution Act, 1867*, the limited use of bylaws has resulted in a lack of case law on which to clarify areas of scope or jurisdictional force. In addition, Section 88 of the existing *Indian Act* provides, in some instances, for the application of provincial laws on reserves. This situation has contributed to problems of clarifying a band council's law-making authority.

Where the courts have been involved in interpreting the scope or jurisdictional force of band council law-making powers, the results have been mixed. As a general rule, the courts have held a band council's law-making authority to be narrow. The courts have also held that federal laws of general application and, in some cases, provincial laws of general application may apply on the reserve.

On the other hand, it is clear from Section 88 of the Act that if a band law has been validly enacted, it will prevail over an inconsistent provincial law. As well, in a recent court decision involving bylaws (the Ward and the Patles cases), a band fishing bylaw was ruled to be a validly enacted law that took precedence over federal fisheries regulations.

Notwithstanding the above, the present lack of jurisdictional clarity and the fact that federal or provincial laws of general application *may*, in many instances, be held to apply to Indians living on reserves is a major concern among Indian leaders and was widely discussed during Phase II of the Review. In their view, these factors severely constrain the ability of Indian governments to exercise control over their affairs, to apply their customs and traditions, and to work effectively toward the attainment of their objectives.



Options Proposed to Clarify and Broaden the Range of First Nation Law-making Authority

Indian communities visited during Phase II of the Review identified a number of options for clarifying, enhancing and broadening the law-making powers of Indian band councils. These options covered a wide spectrum of potential changes ranging from minor amendments to the *Indian Act* to a comprehensive re-statement of First Nation law-making authority.

As an initial step, it has been suggested that the Act could be amended to reduce the scope of the Governor-in-Council's regulatory authority. As noted earlier, the Governor-in-Council's regulatory authority under Section 73 overlaps with band council law-making powers under Section 81. Where conflicts occur, the regulations take precedence over a band law. Beyond Section 73, there are many other areas of the Act that authorize the Governor-in-Council to make regulations.

In consultation with First Nations, the Governor-in-Council's regulatory authority could be limited to areas where jurisdictional issues are at stake or where there is a perceived need to adopt national or uniform standards. Under this scenario, bands themselves could be given the power to establish laws in most of the areas now subject to Governor-in-Council regulations. This approach would remove a significant impediment to a band council's law-making authority.

However, such a change would not address the widely held opinion that only Indian control of the major fields of law-making power, *and* the exclusive authority of bands to regulate in those fields, will result in the necessary range of powers to pursue and attain community objectives and permit the effective application of custom and tradition. To accomplish this would require much more comprehensive amendments to the *Indian Act*.

A second option, therefore, would be to amend the Act to provide band councils with the authority to enact laws and deliver services in all legislative fields currently granted to the provinces under the *Constitution Act*. This option, which was suggested by many Indian leaders during Phase II, would give Indian band councils comprehensive powers in such areas as health, education, social services, family law, environmental protection, public law and order and the administration of justice. Under this scenario, and using the field of health as an example, responsibility for all aspects of public health, hygiene, design and delivery of health care services would rest with Indian bands.

To exercise such responsibility, bands would clearly require not only broad legislative and regulatory authority in the various fields of law proposed, but also:

- additional staff expertise;
- a variety of administrative and regulatory structures;

- adequate funding to support service delivery activities (e.g., health care); and

- the legal capacity to enter into a variety of contractual arrangements for the delivery of services.

While this option comes closest to achieving what Indian communities see as their right to self-government, it was recognized that significant consultation would be required with provincial governments as well as other federal government departments to sort out jurisdictional problems in many fields (in particular, health care, environmental protection and administration of justice).

A third option would be to bridge the gap between the two options discussed above. Under this option, the *Indian Act* could be amended to clarify and expand the scope of many of the existing First Nation law-making powers and to add certain additional powers that are considered essential for Indian communities to achieve their objectives.

Again using health care as an example, health-related authority could be organized under two categories in the *Indian Act*:

- Category I — public health, preventive measures and safety standards; and

- Category II — design and delivery of health care services.

Under this scenario, the Governor-in-Council might retain authority under the first category (i.e., for establishing national standards and monitoring public health standards and regulations). Bands, in turn, would have the authority to design and deliver health care services. Bands could then exercise their authority to tailor programs to meet their needs. They would also have the authority to negotiate delivery mechanisms with provincial governments and/or public and private institutions.

Each of the options for change outlined above offers First Nations the opportunity for expanded authority to enact and enforce laws that are relevant to their particular community needs, as well as greater control over the administration and management of their affairs.

One message that is clear from discussions to date, however, is that any proposals for legislative change that may emerge from the Review must be structured to provide maximum flexibility. Perhaps more importantly, Indian communities have indicated that such legislative changes must be optional in nature. This, of course, is completely consistent with the guiding principles for the overall Review.

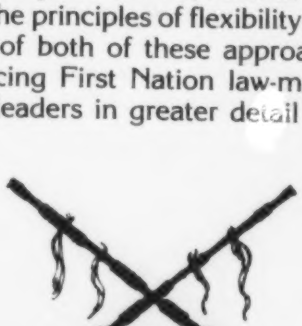
For example, many bands have indicated that, at this time, they are not ready to take on added responsibilities. Others have indicated they *are* ready to assume these responsibilities, and these bands feel they should have the flexibility to expand their authority and accountability at a pace that best suits their needs.

Under an optional (or "opt-in") approach to enhancing the law-making authority of First Nations, the *Indian Act* could be amended to enable First Nations to take up authority and control in those fields of law where *they* perceive their needs to be most urgent and at a pace triggered by *their* decisions and aspirations. Under such an approach, any First Nation could enhance its authority and control in a step-by-step fashion over a number of years or, if it so desired, in one comprehensive step. Until such time as a band was ready to take on additional authority and control, the Minister would exercise existing authorities and control.

In the view of many Indian observers, even greater flexibility must be introduced to the "opting-in" approach in order to accommodate the uniqueness and diversity of Indian communities across the country. Many believe that in developing a new concept of First Nation law, a band's authority to enact laws must be defined as comprehensively as possible. In this way, Indian communities would have significant flexibility in selecting not only the areas in which they wish to make laws, but also the range of authority and responsibility they are willing to undertake. In other words, they could choose to have minimal (or no) authority and responsibility in one area of law, and maximum authority and responsibility in another.

The approaches to First Nation law-making authority outlined above would provide for the gradual assumption of self-directed community government and significant movement toward self-government. However, a number of leaders felt that full self-government can likely be achieved only through an amendment to the Constitution. While many Indian community leaders indicated that this is a top priority on their agenda for change, it was also recognized that the process of amending the Constitution would be conducted in a different forum and does not fall within the mandate of the Review.

To this point, discussion of possible approaches for expanding a band council's law-making authority has focussed on amendments to the existing *Indian Act*. During Phase II of the Review, some First Nations put forward other legislative approaches. Among the alternatives mentioned were a completely new *Indian Act* and a series of First Nation acts dealing with specific areas, such as lands, governance, elections and education. The principles of flexibility and opting-in were both seen as key features of both of these approaches. These and other approaches to enhancing First Nation law-making authority will be explored with Indian leaders in greater detail during Phase III of the Review.



Application of Provincial Laws on Reserves

"There is a need to amend Section 88 to make it unequivocally clear in express language that bands have the power to make bylaws, that they are to be enforced and that they take precedence over provincial laws of a general nature."

Band Councillor
LRT Review Meeting
Nova Scotia
October 6, 1988

"The strength of bylaws needs to be maximized. Questions over authority and jurisdiction need to be solved ahead of time so bylaws work and other laws are not imposed on the community."

Band Councillor
LRT Review Meeting
Vancouver Island, British Columbia
September 20, 1988

Background

Under Section 91(24) of the *Constitution Act*, the Parliament of Canada has legislative responsibility for "Indians and lands reserved for Indians". Provincial legislatures cannot legislate to affect reserve lands, or pass laws that relate to Indian-ness. Nevertheless, there is still a great deal of provincial law that *does* apply to Indians through two avenues.

First, when acting within their own powers under Section 92 of the *Constitution Act*, provincial legislatures can pass laws that extend and apply "of their own force" to Indians on reserves, as long as the laws do not affect their lands or their status as Indians (i.e., their Indianness) and do not conflict with federal laws (including band bylaws). For example, provincial legislation in such areas as commercial, business, environmental and family law have been held by the courts to apply within the boundaries of the reserve.

The second avenue is Section 88 of the *Indian Act*, which specifically states that provincial laws of general application apply to Indians, subject to the terms of any treaty and any other Act of the Parliament of Canada, provided:

- they are not inconsistent with the *Indian Act* "or any order, rule, regulation or bylaw made thereunder"; and

- they do not make provision for any matter for which provision is made by or under the *Indian Act*.

By virtue of Section 88, validly enacted provincial laws of general application which incidentally touch Indians as Indians will apply if they meet the above conditions.

Problems Identified by Indian Communities

While some Indian leaders have noted that Section 88 provides a degree of protection against the application of provincial laws, others are quick to point out that it also enables the application of certain provincial laws that otherwise would not apply. In fact, because it permits the application of provincial laws on reserves, many Indian leaders believe that Section 88 effectively incorporates provincial laws of general application into the *Indian Act* law-making regime. As well, the Supreme Court of Canada has ruled that, with a few exceptions, provincial laws of general application apply to Indians living on-reserve (unless they conflict with laws validly made under federal authority).

Bands that participated in Phase II of the Review expressed strong desires to significantly reduce or eliminate *any* chance of provincial laws applying to Indians or Indian lands.

In their view, the regulatory aspect of provincial law operates as a significant constraint on the policies and practices that bands may wish to pursue in the expression of their particular cultural and developmental preferences.

Options Proposed for Reducing or Eliminating the Application of Provincial Laws on Reserves

Indian leaders have suggested that a number of options exist for reducing the application of provincial laws on reserves.

The first option could see Section 81 law-making powers expanded into areas currently granted to provincial governments, (e.g., family law, environmental protection, etc.). In this scenario, provincial laws would in most instances not apply (provided that a valid First Nation law was in place). However, provincial powers are wide-ranging and it is doubtful that every application of provincial general laws could be removed with this approach.

An alternative could be to amend Section 88 to provide that provincial laws of general application apply to Indians on reserves only where those laws have been declared by Indian bands to be applicable. This would indicate to the courts that the incorporation of provincial general laws is the exception rather than the rule.

Finally, Section 88 could be amended so that provincial laws of general application would not apply to Indian bands with a constitution under the *Indian Act* if the laws were inconsistent with that constitution or any treaty, jurisdictional agreement, band law, etc. This option, which is similar in some ways to the self-government agreements negotiated by the Cree-Naskapi bands of Quebec and the Sechelt Band of British Columbia, would be particularly compatible with the principle of bands "opting-in" to significant additional powers (as discussed earlier in the "First Nation Law-Making Powers" section of this chapter).

As some Indian leaders observed during Phase II, there may be constitutional implications associated with some of the above options and others that may emerge during discussions with Indian communities.

Role of the Minister in the First Nation Law-Making Process

"The ministerial disallowance power must, at a minimum, be modified. If it is supposed to be a safeguard for individual rights, then it should be limited and precisely defined. It may be better to simply remove it."

Band Councillor
LRT Review Meeting
Vancouver Island, British Columbia
September 20, 1988

"The Minister's disallowance power should be removed. Bylaws should control what the band wants controlled, and the Minister should have nothing to say about it."

Band Councillor
LRT Review Meeting
Vancouver Island, British Columbia
September 21, 1988

Background

Section 82 of the *Indian Act* empowers the Minister of Indian Affairs and Northern Development to disallow any Section 81 general purpose bylaw within 40 days of receipt of the bylaw. As well, the Minister must approve all Section 83 taxation or money bylaws, and there is no timetable for approval. The only bylaws over which the Minister does not hold discretionary disallowance or approval powers are intoxicant bylaws passed under Section 85.1 of the *Indian Act*. However, copies of these bylaws must be forwarded to DIAND for recording purposes.

Problems Identified by Indian Communities

The bylaw review and approval process is a major problem area and a cause of significant frustration in Indian communities.

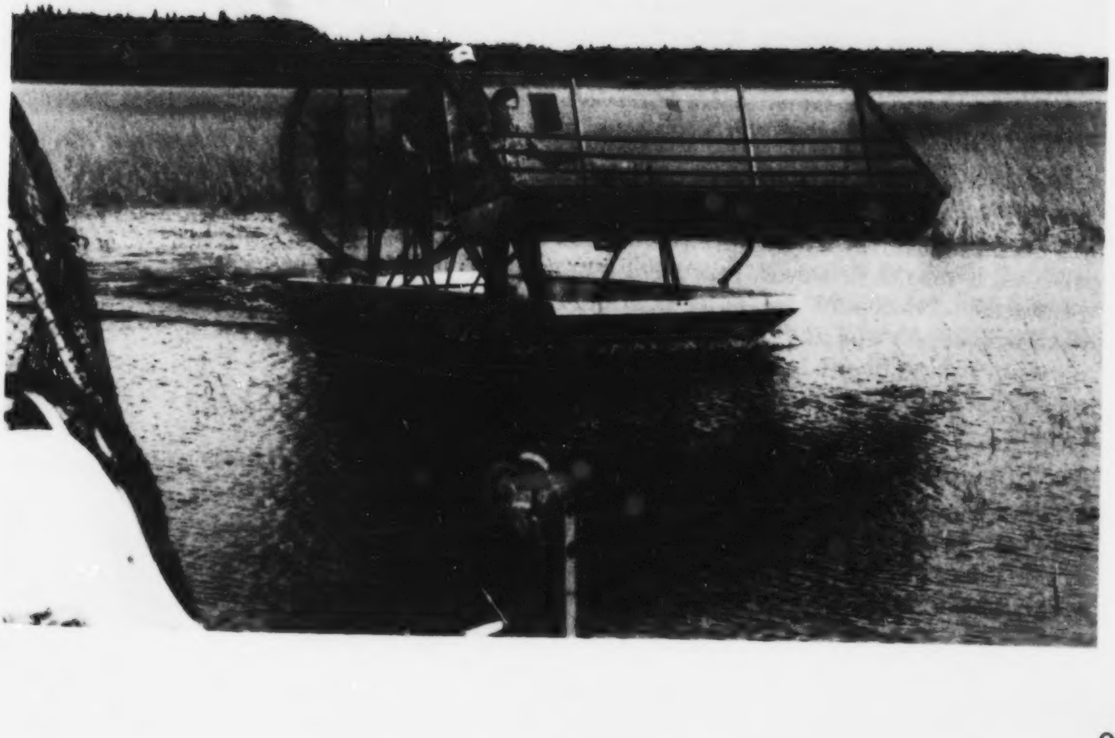
As has been noted by many bands, the Act does not indicate how the Minister's powers of disallowance and approval are to be exercised, and there are no fixed criteria or guidelines to govern the Minister's discretion in relation to these powers.

Historically, the exercise of the Minister's Section 81 disallowance powers has been a particular source of concern and has had a tremendous negative impact on the use of bylaws by band councils. Before

1981, the highest rate of bylaw disallowance by the Minister in one year was 17 per cent. In 1982, the disallowance rate jumped to 50 per cent and in 1983 was at 61 per cent. Since 1987, the disallowance rate has averaged about 40 per cent.

These dramatic increases in the rates of disallowance can be attributed in part to the insistence of Parliament, the Standing Joint Committee for the Scrutiny of Regulations, and the Department of Justice, that the Minister ensure that Indian bylaws do not violate the *Charter of Rights and Freedoms*. A second major reason for disallowance is if the proposed bylaw is *ultra vires* (i.e., it is beyond the legal power or authority of a band council). A proposed bylaw may also be disallowed for other reasons, including infringement on federal or provincial jurisdiction or because it is poorly structured, difficult to understand and arbitrary in nature, etc.

The Minister's disallowance powers account in part for the low use of bylaws by bands, despite their potential for increasing Indian control over their own affairs. Only a few bands in each region of the country have more than 10 bylaws in force. Most bands have had fewer than seven bylaws actually recorded with DIAND, and a large number have none.



Further, as Indian leaders are quick to point out, the federal government's involvement in the bylaw process complicates the accountability of band governments and often results in lengthy delays to accomplish even the simplest of tasks. In the view of community leaders visited during Phase II of the Review, the Minister's power to approve or disallow a bylaw is clearly out of step with any concept of Indians having greater control over their own affairs.

Apart from the above, it has also been suggested that DIAND's multiple roles in the approval process raise the potential for a conflict of interest. Not only does DIAND advise bands on the development of bylaws, it also formulates recommendations to the Minister on approval or disallowance. In addition, the lack of defined criteria or guidelines for approving or disallowing bylaws has led to charges that the Minister's discretionary powers are exercised unfairly and arbitrarily.

Options Proposed respecting the Role of the Minister and the Department in the First Nation Law-making Process

MINISTER'S INVOLVEMENT IN BYLAW REVIEW AND APPROVAL

During Phase II discussions with Indian communities, two options emerged for reducing, revising or eliminating the Minister's involvement in the bylaw review and approval process.

The first option could see the elimination of the Minister's disallowance power as it currently exists in the Act. Under this proposal, the Minister would not be involved with approval or disallowance of the vast majority of laws passed by band councils. However, it is conceivable that ministerial approval would still be required in a very limited number of areas, specifically those that might impact on the rights of individuals or imply a need for resources or funding by the Minister. In such instances, it has been suggested that the Minister's role should not be to simply deny approval, but rather to work with the affected band in a constructive and positive way to arrive at an appropriate resolution of whatever problems may exist with respect to a proposed law.

This approach would not completely address the enormous frustration that currently exists with the Minister's involvement in the bylaw process. It would, however, represent a significant improvement over the status quo because the Minister would be far less involved in bylaw disallowance. As well, Indian communities visited to date see this option as being a significant improvement because of its flexibility and the fact that it allows for dialogue to resolve problems related to proposed bylaws.

The second option for change could see complete removal of the Minister from the bylaw process. Under this scenario, the validity of bylaws could be tested only through the courts. However, there might still be instances where funding implications could stem from the bylaw which would require consultations and negotiations with the Minister.

With the reduction or complete removal of ministerial involvement in the bylaw process, bands would be required to establish bylaw approval processes. This fact was recognized and accepted by Indian leaders participating in Phase II of the Review as a necessary and desirable prerequisite to gaining control over the law-making aspects of their community affairs. Based on discussions to date, the principal elements of such an approval process would appear to include:

- publication and public reading of proposed bylaws;
- membership ratification of important bylaw matters (i.e., band constitutional changes); and
- a review and appeal mechanism to permit opportunities for individual community members to express their views on proposed laws.

As well, it was noted by many Indian leaders that a clearer understanding would be required of when a band council could act without the approval of the band (this is further discussed later in this chapter under "Band Council Authority and Accountability").

There are undoubtedly other options for change that will be raised during Phase III consultations. However, regardless of which option is selected, the Minister will still have an obligation to Parliament to protect individual rights. A significant issue, therefore, will be how to preserve a reasonable balance of collective versus individual rights. This issue was raised on numerous occasions during Phase II discussions with Indian communities, with a variety of suggestions put forward. One proposal was for an Indian ombudsman or some other form of Indian body that might address a variety of rights issues. Many Indian leaders also expressed the view that there could be a major role for a council of elders in resolving such issues.

DIAND'S ROLE IN THE LAW-MAKING PROCESS

While many Indian communities have suggested that they do not want the Minister involved in bylaw approval or disallowance, they nevertheless feel there is a major role to be played by DIAND in providing advice and assistance in formulating band laws. For example, the concept of a First Nation law-making advisory board has been put forth. In addition, Indian communities expressed the need for funding for legal assistance, a guide book on how to formulate bylaws and sample laws in specific areas.

Further, it has been envisioned that any significant expansion of First Nation law-making authority could result in jurisdictional and policy disputes with other federal government departments or provincial governments. These disputes would require negotiated resolution, and many Indian community leaders expressed the view that the Minister and the Department could adopt a major new role as an advocate, working on behalf of Indian bands to resolve such disputes.

Law Enforcement and the Administration of Justice

"Canadian law is based upon punishment for crimes against the Queen and removal from the community (incarceration). Indian law is based upon hundreds of years of community custom and values, a quick determination of fair punishment, restitution of the victim (community service) and a healing of the rift in the community."

Band Councillor
LRT Review Meeting
Ontario
November 8, 1988

Background

Under the Canadian legal system, the provincial governments are responsible for the administration of justice while the federal government is responsible for the enactment of criminal law. The provinces may enact legislation to establish police forces or contract for services from the Royal Canadian Mounted Police (RCMP). Since the 1970s, policing services to Indian communities in all the provinces and territories except Ontario and Quebec have been provided by the RCMP. Policing arrangements in Ontario are provided by the Ontario Provincial Police force, and in Quebec an independent Indian police force operates on reserves with authority to carry out a narrow range of policing duties.

In 1971, DIAND issued Circular 55, which outlined options available to Indian communities for the development and delivery of policing services on reserves. Circular 55 authorizes the appointment of band bylaw enforcement officers to enforce bylaws of a civil nature on reserves. Since that time, a number of tribal police forces have been established (including the Dakota-Ojibway Tribal Council Police Force in Manitoba and the Amerindian Police Force and the Kahnawake Peace Keepers in Quebec). Each of these forces is an offshoot of the Circular 55 program. Under these particular arrangements, the police forces are authorized by the provincial attorneys general, or the RCMP, to undertake a narrow range of policing duties within the Indian communities they serve.

In 1984, Treasury Board froze DIAND's funding authorities for Indian policing services because of the lack of a clear policy and appropriate guidelines for the delivery of policing services. As a result, DIAND has been forced to re-allocate funds from its budget to cover cost increases and maintain existing levels of services to native communities. For the 1989-90 fiscal year, DIAND's budget for policing services on Indian reserves is approximately $18.4 million.

In 1986, a federal Interdepartmental Task Force was established to conduct a national review of on-reserve Indian policing policy. The Task Force's report, published in January 1990, outlines the key issues to be addressed in the formulation of a comprehensive policy on the delivery of policing services to Indian communities. However, the focus of that study is primarily on the criminal side of enforcement on reserve lands, and not the enforcement of civil bylaw matters.

In terms of administering justice, Section 107 of the *Indian Act* authorizes the Governor-in-Council to appoint Justices of the Peace with judicial authority over all civil bylaws and minor criminal matters (e.g., common assault, break and enter and cruelty to animals). However, to date only five justices of the peace have been appointed, and the use of such appointments has increasingly come into question. As a result, violations of band bylaws must be handled for the most part through the provincial court system.

Problems Identified by Indian Communities — Bylaw Enforcement

The widest possible range of law-making powers are of no use to Indian bands if the laws cannot be enforced. This point was raised frequently during Phase II discussions with Indian communities.

In considering this issue, it is important to differentiate between enforcement of band civil laws (bylaws) and enforcement of the criminal law. In both cases, enforcement at the Indian band/reserve level is made difficult by:

- questions of jurisdiction;
- the wide variety of enforcement arrangements that exist across Canada; and
- the lack of adequate resources and capacity in many parts of the country.

In regard to jurisdiction, many bands have perceived an overwhelming reluctance on the part of provincial police forces and the RCMP to become involved in band bylaw enforcement. For example, the RCMP is unwilling to enforce existing band bylaws because the force's mandate is to deal with criminal and federal offenses, not civil matters. Similarly, provincial police forces do not consider band bylaws as falling under provincial law or within their *Criminal Code* responsibilities. At the same time, the *Indian Act* does not provide a band with express authority to create its own police force to enforce either criminal or civil matters on reserve lands.

Although bands do not have the express authority to create their own police forces, Circular 55, as noted earlier, has enabled some bands to assign their own conservation officers, peace keepers or bylaw officers to enforce their civil laws. The appointment of enforcement officers has worked well and represents an appropriate solution in some instances to the enforcement problem. However, there are significant costs for bands, both for hiring and training enforcement officers and for the enforcement process. While the Circular 55 program helps subsidize the cost of enforcement, the freeze on funding means that many bands are still unable to appoint enforcement officers.

It has been suggested that the costs of enforcement could be offset if fines for violating band bylaws were paid directly to the band. However, Section 104 of the *Indian Act* stipulates that fines are to be paid to the federal government "for the benefit of the band". In turn, the government may direct that the fine be paid to a provincial, municipal or local authority which bears the expense of administering the bylaw in question. Studies indicate that the costs of enforcement exceed revenue generated through fines, which means there is seldom any money left to be transferred to the band. As a result, many bands are not in a financial position to appoint enforcement officers.

Options Proposed to Improve the Enforcement of Band Bylaws

During Phase II of the Review, Indian bands identified several important changes and enhancements that could be made in the bylaw enforcement area.

For example, enforcement could be improved by providing bands with a much clearer authority and appropriate resources to appoint bylaw enforcement officers, conservation officers and peace keepers.

In addition, the *Indian Act* could be clearly amended to empower bands to appoint their own police forces or officers to enforce both band civil laws and certain criminal laws on reserve lands. This would necessitate the resolution of jurisdictional issues between the federal and provincial governments, particularly related to the enforcement of criminal law matters. (For a more complete discussion of the jurisdictional issues surrounding the enforcement of criminal law, please see the *Indian Policing Policy Review Task* Force Report referred to earlier.)

Another option suggested by Indian communities is for the federal government to support the increased use of band/tribal council police commissions along the line of the Amerindian, Akwesasne and Six Nations models. For example, the Akwesasne Police Commission is composed of a representative from the band council, a former police officer and a member from each district. This enables an effective level of independence from the band council in terms of the day-to-day operation of Akwesasne's 10 peace officers. Similarly, the Six Nations Police Commission is responsible for the planning, direction and policies of the Six Nations Police Force (hiring procedures must be approved by the chief and council). However, the commission does not have a mandate to interfere in the day-to-day operations of the police force or in decisions to prosecute.

Problems Identified by Indian Communities — Administration of Justice

Effective enforcement of band bylaws involves not only the laying of charges against offenders, but also a means of prosecution, adjudication and sentencing. Again, Indians believe the provisions for administering justice on the reserve are woefully inadequate and do not effectively take into account local customs and traditions.

At the most general level, Indian communities believe the Canadian judicial system is not now adequately supporting the enforcement of band bylaws because of jurisdictional gaps, confusion over procedures and policies, and a general lack of resources. For example, bands must primarily rely on the provincial court system and provincial Crown attorneys to prosecute bylaw offenders. Unfortunately, Crown attorneys have a heavy workload and will usually intervene only in the case of criminal and statutory offenses. As a result, bands must often initiate proceedings where their bylaws have been violated.

Further, the remoteness and isolation of many Indian communities means that access to the judicial system is often limited to sporadic and hurried visits by circuit courts. While the *Indian Act* does provide (under Section 107) for the appointment of justices of the peace, their powers are limited and only a few appointments have been made. A primary reason for the lack of appointments is that it is difficult to find qualified persons to serve as justices of the peace in native communities, since it is important that these people be Indian *and* that they have appropriate backgrounds and experience. There are also legal concerns over the use of such appointments.

Problems in this area are magnified by Indians' deep distrust of the Canadian judicial system which they often refer to as "the injustice system". Indeed, many First Nation leaders see the system as foreign to the Indian concept of justice. They view the legal system not as a "protector" but rather as an "enforcer" of non-Indian law.

Options Proposed to Improve the Administration of Justice

Indian community leaders have offered several proposals for enhancing the administration of justice on reserves.

For example, it was suggested by several Indian communities that greater use be made of Indian justices of the peace, with these individuals assuming specific judicial responsibilities from the provinces. This process would require amendments to Section 107 of the *Indian Act* to clarify and expand into criminal law the jurisdiction of justices of the peace.

DIAND could also explore with the Department of Justice the use and application of uniform ticketing programs. These programs permit a guilty plea to be entered and a fine to be paid without a court appearance. It has been pointed out that approximately 90 per cent of bylaw infractions at the Indian community level could be resolved through uniform ticketing. This would reduce costs, increase a band's revenues and possibly reduce Indians' contact with the non-native judicial system.

Programs with fine options represent another potential solution to the problem of administering justice on the reserve. These programs could result in more sentences that involve community service as opposed to fines or incarceration. The Department of Justice is currently exploring the use of such programs, and it has been suggested that DIAND approach Justice to have this option considered from the perspective of Indian communities as well. Some Indian community representatives visited during Phase II saw this type of program as an opportunity for their communities to become more involved in administering justice.

As well, DIAND could explore with First Nations the potential for new arrangements between bands and provincial governments that would enable Indians to administer some elements of provincial law and the *Criminal Code* (such as minor offences and young offenders). Indeed, some bands have already begun to focus on developing community-based mechanisms. For example, the South Island Tribal Council has taken over responsibility for young offenders from the provincial courts. The Saddle Lake Tribal Council has also established a justice system in which a peace maker works with the person charged with an infraction to seek a resolution. Where this fails, a court forum is held with a round table of three elders who render decisions and impose punishments.

However, many Indians (and a growing number of non-Indians) believe that the only acceptable solution to the problem of law enforcement and administration of justice on reserves is to establish an Indian justice system. Only in this way would the federal government address the concern that the Canadian judicial system fails to recognize the significant cultural differences which exist between Indian and non-Indian communities.

INDIAN JUSTICE SYSTEM

It has been suggested that three possible approaches exist under Canadian constitutional law for establishing an Indian justice system. The first option could be to create an Indian justice system comparable with a provincial superior court. This would require joint federal/provincial legislative initiatives. Under Section 92(14) of the *Constitution Act, 1867*, provincial governments would enact the necessary legislation creating a separate Indian justice system. The federal government would then appoint the judges (Section 96 of the *Constitution Act, 1867*) and grant the court authority over Indians and Indian lands (Section 91(24) of the *Constitution Act, 1867*). In theory, such a court could have very broad jurisdiction with respect to federal, provincial and constitutional law matters. Similar legislative mechanisms could be used to create an Indian justice system comparable with a provincial lower level court.

Option two could be to take action under Section 101 of the *Constitution Act, 1867*, which gives the federal government exclusive authority to establish a court through separate legislation. This court could be created as a division of the Federal Court or incorporated within the *Indian Act*. The jurisdiction of a federal court created under Section 101 could potentially extend to all laws passed pursuant to the federal government's jurisdiction over Indians and Indian lands.

The third option could be the establishment of an Indian court as an aboriginal right under Section 35 of the *Constitution Act, 1982*. If aboriginal peoples have a right to self-government under Section 35, it may also be possible for them to establish their own court system. The jurisdiction of such a court would presumably encompass all the powers and jurisdictions of the self-governing community it serves, including the application of First Nation customary laws and concepts of justice.

During Phase II discussions with Indian people, it was recognized that while the concept of an Indian court offers significant potential for alleviating problems of enforcement and administration of justice, the options set forth above (particularly option three) represent longer term solutions in the field of administration of justice. Creation of a parallel justice system for Indians would require extensive funding, negotiations between Indians and the federal and provincial governments, legislative amendments, the establishment of administrative support mechanisms, etc.

To this point, the above options have not been discussed with, or had the benefit of input from, either Justice Canada or the provincial governments. However, there are currently a number of enquiries underway across Canada dealing with major issues related to aboriginal justice. These enquiries have dramatically heightened Indian people's interest and awareness of these issues. It is anticipated that the reports, conclusions and recommendations arising from these enquiries will have a major impact on work in this area during Phase III of the Review.

Legal Status and Capacities

> *". . . there are numerous examples of bylaw power areas where it should be up to the band to negotiate consent and agreement to the exercise of band authority with other jurisdictions. . . The band or a group of bands could negotiate with the province just as the province or provinces negotiate with the federal government and vice versa."*
>
> Band Councillor
> LRT Review Meeting
> Vancouver Island, British Columbia
> September 22, 1988

Problems Identified by Indian Communities

The current *Indian Act* provides no cohesive framework for the exercise of powers by the band. In particular, the legal capacities and overall status of Indian bands and band councils is not provided for in the Act, nor has the issue been adequately clarified by the courts. Because of this, Indian leaders have noted, bands are limited in their abilities to exercise, in the band's name, rights that most collective bodies have come to take for granted within the Canadian legal system. These include the right to:

- enter into legal and contractual arrangements in the band's name;
- own land or other property in the band's name;
- hold, borrow, expend and invest money in the band's name; and
- sue in the band's name.

Although bands can enter indirectly into legal relationships, the absence of a clear legislative statement of the legal status and capacities of a band tends to discourage, or at least to complicate, contractual or commercial arrangements requiring a measure of legal formality.

Beyond this, as many bands pointed out in Phase II discussions, it is extremely difficult to carry on as a government without appropriate legal status and capacities. For example, carrying on government activity involves hiring employees, purchasing supplies and entering into contractual relationships for the delivery of many essential services. Further, the acquisition and disposition of property (including land) and the making, incurring and guaranteeing of loans, are key elements of any strategy for community development.

As a result of the absence of a clear statement of the legal status and capacities of bands and band councils in the current *Indian Act*, bands wishing to sign contracts for even basic community services often experience difficulties. This is because municipal authorities and private companies are sometimes hesitant to sign agreements with an entity that has no status in law. For the same reason, provincial governments may be reluctant to negotiate with bands on joint initiatives or agreements. Similarly, the absence of authority to deal directly with its lands and moneys significantly constrains a band's options.

This issue takes on added significance if bands are to assume more direct control over such matters as economic development and increased responsibility for providing services to band members. The uncertainty of the present legal status of bands not only adds to the cost of business relationships with outsiders but may restrict the benefits that flow from those relationships. As many Indian communities have pointed out, a major legislative clarification of the legal status and capacities of bands and band councils is in order if First Nations are to take greater control over their own affairs.

Options Proposed for Clarifying the Legal Status and Capacities of Bands and Band Councils

The issue of legal status and capacities has been addressed in special legislation recently enacted for the Sechelt Band in British Columbia and for the Cree-Naskapi bands in Quebec. These separate pieces of legislation declared the bands to be either legal entities or corporations, permitting them to deal with the outside world directly in the band's name. In addition, specific powers and capacities have been spelled out for these bands. Similar approaches for *Indian Act* bands have been suggested by some Indian leaders.

During Phase III, a number of questions can form the basis for discussions with Indian communities to help clarify this issue. These include:

- should Indian bands be declared by statute to be legal entities with full status in law?

- do bands want the express power to acquire and hold in their name lands outside the reserve, whether for band government purposes (e.g., to provide services to the reserve), for the benefit of band members on or off the reserve, for investment purposes or otherwise for the general benefit of the band?

- do bands want or need the power to expropriate private interests on reserve lands for the welfare of the band as a whole?

- does a band require the express capacity to contract in its own name? This does not imply that restrictions could not be placed on this capacity. From the federal government's perspective, it may be appropriate or necessary to consider controls where government grants are expended, given the general public interest in such matters.

- do bands want or need express borrowing power? If so, should there be limitations on this power to reflect the interests of present and future band members? What should these limitations be?

- do bands want or need the power to make investments? This power could address both the short-term investment of money that is surplus to current needs, and the long-term investment of band capital moneys.

- do bands require the express capacity to sue in their own name? At present, it is uncertain whether and when a band may sue in its own name or when it must proceed by way of a representative action brought by someone on its behalf.

- do bands want to be declared capable of being sued in their own name? If so, what are the implications regarding the protection of band lands and capital moneys?

Band Council Authority and Accountability

Problems Identified by Indian Communities

The division of powers between a band and its council is not well defined in the current *Indian Act*. For example, the Act gives some functions to a band (e.g., to surrender lands) and others to the band council (e.g., to make laws). Apart from provisions governing the election of councillors, the Act does not spell out the nature of the relationship between band members and the council.

Every organization, including an Indian band, requires decisions to be made through a clearly defined line of authority. It would be extremely cumbersome, for example, to require every contract, expenditure or legislative decision made by a band council to be authorized by a vote taken at a band meeting. For this reason, it is important for bands to be able to delegate certain powers to their band councils. In turn, it has been argued that if band councils are expected to exercise legal and governmental powers on behalf of their members, the *Indian Act* or some other formal instrument (such as a band constitution) should spell this out clearly.

At the same time, most Indian communities visited during Phase II of the Review indicated a strong desire for band members collectively to play a greater role in the conduct of local affairs. In this regard, the view was often expressed that powers given to a council to act as the executive arm of a band should be qualified. For example, the consent of band members for certain decisions of council was considered desirable, particularly in sensitive areas such as:

- changes to a band's constitution;

- expenditure of capital moneys, including budgets and spending plans;

- borrowing of money, particularly large or long-term commitments;

- disposition of certain assets, particularly lands; and

- licensing the use of certain assets, particularly for long periods.

Aside from the above, many communities visited in Phase II expressed the need for a formal mechanism to permit the band memberships to periodically review the performance of the band councils. As well, there was considerable interest expressed in some formal mechanism to protect the rights of individuals whose welfare may be affected by decisions of the band council.

Options Proposed to Clarify the Authority and Accountability of a Band Council

Several options exist for clarifying the authority of a band and its council.

One option could be to confer both legal powers (i.e., legal status and capacities) and governmental law-making powers on the band itself, with the council serving as an executive agent for the band. In principle, this is the approach adopted in the Cree-Naskapi self-government legislation referred to earlier. Under this legislation, the individual bands are constituted as corporations and act through their councils in exercising the rights, privileges and powers that corporate status legally bestows on them.

A second option could be to give the legal powers to the band and the governmental powers directly to the council. In this approach, the council could also be named as the body through which the legal powers of a band are exercised. This is essentially the approach adopted by the Sechelt Band. Under that model, the exercise of governmental and legal powers given to the council has been defined and limited in a band constitution.

A slightly modified approach could see all the legal and governmental powers given to the band, along with the authority to delegate any or all of these powers to the council. This option would lead to a division of governmental powers between the band and its council. It has been suggested by some Indian community leaders that while this option has the advantage of flexibility, a formal and open procedure for the exercise of the delegation power would be necessary in order to avoid confusion or disagreements about which powers lie with the band and which powers rest with the band council.

The options discussed above provide the flexibility that Indian bands have indicated is necessary in defining the authority of their councils. In this regard, many Indian leaders have suggested that greater use might be made of band constitutions or formalized community rules and regulations as a means of enabling bands to make choices in dividing decision-making authority between the band and band council. Such an approach, it was felt, would provide greater flexibility than to entrench the division of powers in the *Indian Act*.

As noted earlier, two related issues emerge from the discussion of the division of powers between a band and its council. These are the rights of individual band members (as opposed to the band as a collectivity) and the issue of holding a council accountable for its actions.

In regard to the first issue, the *Indian Act* provides little direction on how individual band members can influence the actions of a council, either before or after decisions have been taken.

Experience at other levels of government has shown that mechanisms are in place to ensure that individuals who might be affected by decisions of government have an opportunity to address the issue before the decision is taken, as well as some means of appealing or otherwise challenging the decision either prior to, or upon, implementation. Traditionally, Indian communities have placed greater emphasis on the overall needs of the community at large. However, they recognize the importance of providing a mechanism (or mechanisms) to permit the expression of individual views on possible decisions or actions of the band council that may adversely affect a community member or his or her family.

As noted earlier, Indian leaders visited to date have articulated a number of ways to provide for a balancing of individual versus collective rights. Among the mechanisms proposed are a community-based process for reviewing and approving First Nation laws. It was also felt that many of the options proposed for resolving problems associated with the administration of justice would be of some value in this area as well (including an Indian ombudsman, a council of elders, an Indian-controlled human rights tribunal or, ideally, some form of Indian court).

Indian community leaders noted that this issue will take on even greater importance if bands (or band councils) are provided with significantly broader law-making powers under a revised *Indian Act*. These leaders have also implied that it may be necessary to explore the potential for a separate charter of rights for First Nations and their laws.

In regard to the issue of accountability, Indians in many communities visited during Phase II of the Review felt that there was a need for a mechanism to ensure that band councils remain accountable to the electorate for such matters as financial management and good government. A variety of proposals were put forth for dealing with the accountability issue. For example, it was suggested that the *Indian Act* could be amended to establish a bylaw power enabling the band council to establish its own rules for financial management, good government, etc. Alternatively, the issue could be dealt with through regulations formulated by the band council or through a band constitution.

Each of these mechanisms provides the flexibility to enable communities to develop a framework that suits their local needs and traditions, while at the same time, ensuring that band members and other interested parties are kept informed on the manner in which the powers of the band council are being exercised. Similarly, conflict of interest and disclosure requirements could be dealt with through an amendment to the *Indian Act*, regulations or a band constitution.

Interim Departmental Initiatives

Phase III of the Lands, Revenues and Trusts Review provides opportunities for consultations with Indian communities to explore options for change which could be pursued by the federal government. In the interim, however, the LRT Review process has identified a number of areas where Indian leaders and the department believe immediate action could be taken to improve internal departmental processes.

For example, additional staff have been hired to alleviate workload problems in the bylaws area. The department has also adopted a more proactive role by working with several bands in reviewing existing and disallowed bylaws and developing model bylaws in such areas as health care.

Other projects completed or under way at the time of publication include:

- publication of a revised bylaw manual;
- development of an additional level in DIAND's bylaw course for delivery to both bands and departmental officials;
- adoption of a more supportive policy regarding the review of Section 81 bylaws; and
- development of sample bylaws or guidelines concerning each Section 81 authority to assist bands in the formulation of their laws.

Moving into Phase III

Indian community leaders have made it clear that any attempt to amend the existing *Indian Act* to improve the scope of law-making powers or the means of administering and enforcing band laws will meet limited success unless the values and needs of their communities are addressed in the amendments. With this in mind, any new concept of First Nation law must, in their view, effectively address five major requirements. The five requirements are:

- the need to establish clear jurisdiction (both in relation to provincial and federal laws, and in terms of the exact scope of a First Nation's law-making authority) to ensure that bands have the power to establish suitable laws for their communities;
- the need to provide communities with a source of revenue through the exercise of law-making powers. This requires the resolution of significant questions on how Indian communities can use both their lands and their moneys;
- the need to establish a clearer legal basis for bands to deal with other levels of government and other corporate bodies in the pursuit of their objectives;

- the need for a more supportive and constructive role for DIAND in the First Nation law-making process. In this regard, Indian leaders have particularily emphasized the need for the Minister to adopt a major role as an advocate for First Nations in resolving federal/ provincial jurisdictional and policy issues; and

- the need for a more effective institutional and administrative framework, including resources, to support First Nation governments in the exercise of their responsibilities. In particular, this institutional framework must provide more sensitive regimes for the enforcement of First Nation laws and the administration of justice on the reserve.

Resolution of problems and issues associated with these five essential requirements during Phase III of the Review would, in the view of Indian leaders visited to date, make band laws a far more attractive means of increasing Indian control over their affairs and of achieving the goal of self-government.

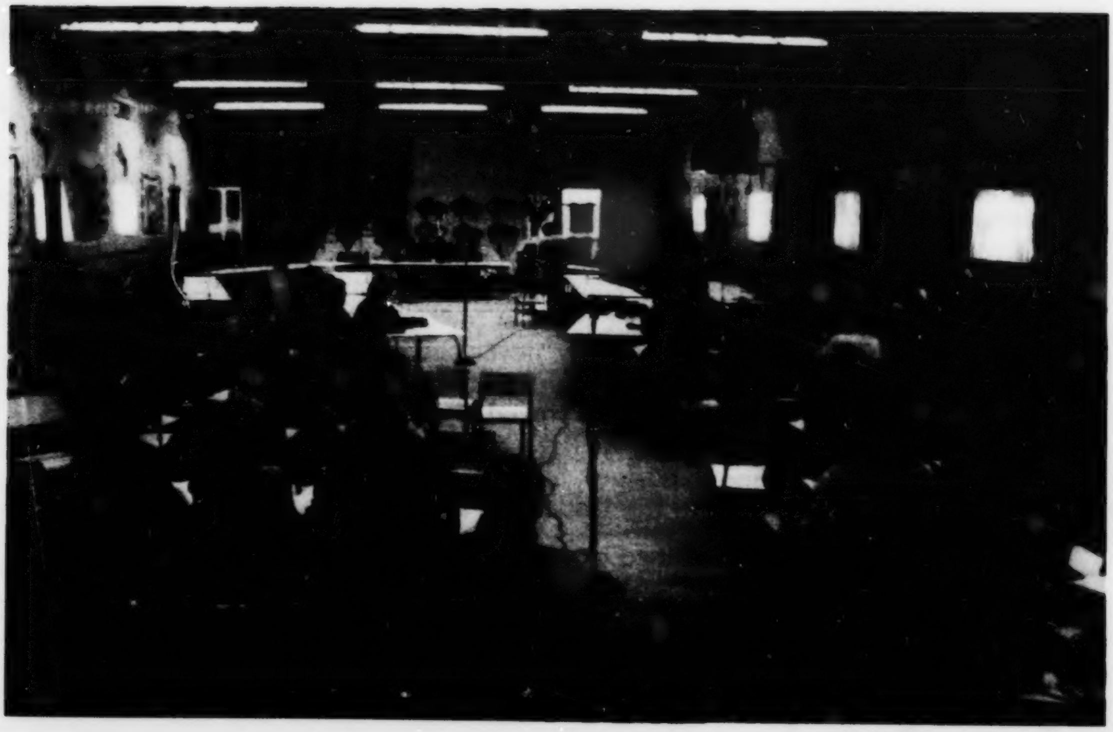
ELECTIONS

"The chief problem with the Act is the total lack of flexibility. There is no recognition in the Act of the diversity of communities across the country. The main recommendation should be for more flexibility. It should be up to the majority of the band members to direct what form of government they want."

Band Councillor
LRT Review Meeting
Sakimay, Saskatchewan
September 27, 1988

"There will always be problems until we have our own (election) rules. There may be some other considerations in determining who can vote — post-secondary students away from home to study, people who work on-reserve but live off-reserve, people away for health reasons, etcetera. If the people decided these people can vote, they should (be able to) vote."

Band Councillor
LRT Review Meeting
Sakimay, Saskatchewan
September 27, 1988



Overview

Elections — the process by which voters select and remove governments — are a cornerstone of the Canadian system of government and essential to ensuring that elected officials remain accountable for their actions.

Elections at all levels of government in Canada — federal, provincial and local — are based on the practice of representative democracy. Each adult citizen has the right to vote for a representative and to participate in the political process. These are fundamental constitutional rights enjoyed by all Canadians.

Through the electoral system, voters put selected individuals in place to represent the interests of the wider community, to make collective decisions on economic and social preferences, to enact laws in specified areas of jurisdiction, and to ensure that community members receive certain basic services. By permitting voters to regularly select representatives from a field of candidates, democratic elections are an excellent means of keeping elected officials accountable for their actions.

In Canada, the federal and provincial governments establish their own election rules, eligibility criteria and appeal mechanisms through legislation and regulations. Municipal elections, while conducted locally, generally follow province-wide standards.

Local governments have a wide range of responsibilities and powers that impact on the quality of life in the community. These include the right to collect property and business taxes, and to spend this money on such important matters as public works, education and economic and social development programs. Elections at the local level are, therefore, a fundamental tool by which Canadians can exercise control over their daily lives.

As with many other aspects of daily life, Indian bands operate apart from mainstream Canadian society in selecting local government leaders. The *Indian Act* recognizes two distinct processes by which members of an Indian band may appoint a chief and council.

One process is based on the band's "custom", or traditional approach to selecting local leaders. This process is recognized under Section 2 of the *Indian Act*. Bands operating according to custom fall into two broad categories: those that have never been brought under sections 74 through 79 of the Act (by order of the Minister or the Governor-in-Council) and those that have "reverted" to custom. Today, more than 40 per cent of Indian bands (255 bands as of April 1989) select their leaders according to custom. In these cases, DIAND is not involved in any formal way with the leadership selection process.

The second process is defined in sections 74 through 79 of the *Indian Act*, which govern the election of chiefs and band councils. These sections of the Act are supported by the *Indian Band Election Regulations* (IBER), which among other things set out the procedures for conducting band elections and the appeal process.

Officials of DIAND are frequently involved in all aspects of elections conducted under the *Indian Act*, from the nomination meeting and establishment of the voters list through to running the polling station, counting the votes and casting a tie-breaking vote where necessary. The department then records the results of the election, maintains a register of the composition of all band councils, etc. DIAND officials also investigate and make recommendations on election appeals.

Issues and Options for Change

As bands have become more active in managing their own affairs and as individuals have become more aware of their rights, frustration with the *Indian Act* and the IBER have grown. One sign of this is the increasing number of election appeals launched by individuals. In recent election years, as many as 20 per cent of Indian elections and by-elections have been appealed.

During Phases I and II of the Lands, Revenues and Trusts Review, a number of problems and issues were identified in the elections area that have contributed to this sense of frustration. Discussions, however, focused on three major areas of concern.

Firstly, perhaps the most frequently encountered problem with the current *Indian Act* election regime is that the Act does not allow Indian bands to define their own rules for conducting elections. Neither the Act nor the IBER allow bands to select aspects of the election process to suit their particular circumstances better. In this regard, during Phase II of the Review Indian community leaders indicated a strong desire for formal recognition in the Act of their right to define their own process for selecting community leaders. This was widely viewed as a means of ensuring that elections would be conducted in a manner that reflects the unique needs and customs of each band.

Secondly, Indian community leaders identified an urgent need to make the *Indian Act* and the IBER far more workable for those bands that do not yet wish to define their own rules and to control all aspects of the election process. Aside from being restrictive, many provisions of the current *Indian Act* election regime are no longer considered practical or appropriate for many communities. Certain of the election provisions of the Act are also perceived to be paternalistic in that they empower the Minister to define aspects of the process and to make discretionary decisions on matters that most bands feel are their responsibility, not the Minister's. Furthermore, both DIAND officials and Indian bands have pointed out that many aspects of a good election process are either not defined at all or are inadequately addressed in the *Indian Band Election Regulations*.

Finally, the department's multiple roles in the election process has emerged as a major source of discontent. In this regard, the need for a new appeal mechanism and a far greater role *by Indian people* in settling election appeals was frequently raised during Phase II by Indian communities.

Each of these primary areas of concern are discussed in some detail in the following pages, together with many of the more interesting options for change that have emerged to date in discussions with Indian people.

Band Election Rules

"Bands must be able to make their own election rules to suit their own communities."

Band Councillor
LRT Review Meeting
Terrace, British Columbia
September 12-14, 1988

"The best overall approach would be to provide a bylaw power and create some flexibility right away so that bands can make their own election rules."

Band Councillor
LRT Review Meeting
Meadow Lake, Saskatchewan
September 29, 1988

Problems Identified by Indian Communities

Under the current *Indian Act*, the only option that has been available to bands that wish to develop their own election rules is to revert to custom. Sixty-five bands have reverted to custom since 1951, with the vast majority (53) doing so between 1972 and 1985. Many of these have reverted out of a genuine desire to return to traditional election practices, with some modifications. However, other bands have used reversion to custom simply as a means of removing themselves from the restrictive provisions of the *Indian Act* and IBER.

Prior to 1985, DIAND generally accepted without question the band's definition of "custom", and required only that a general meeting be held to seek the opinion of band members before authorizing the band to revert to custom. In 1985, however, the Department of Justice indicated that reverting to custom was likely not a legal practice, since Indian election "customs" cannot be codified in law. As a result, reverting to custom is no longer a simple matter.

In March 1988, DIAND adopted a new set of criteria for reversion to custom. Under these criteria, the proposed election system must:

- be supported by the band membership;
- protect the rights of individual band members;
- not involve DIAND or its officers at any stage of the process;

- include a provision for settling election appeals and an amending system that involves membership assent;

- follow the basic principles of natural justice and be consistent with the *Charter of Rights and Freedoms;* and

- be in a clear, written format.

At present, DIAND is using these new guidelines to process a number of requests for reversion to custom. Nevertheless, it is anticipated that the difficulty encountered in defining custom in written terms will remain an obstacle to reversion for many communities.

Options Proposed by Indian Communities for Resolving Problems Associated with the Selection of Leaders

During Phase II discussions with First Nation communities, two basic options emerged to enable Indian bands to define their own election rules and procedures. The first would be to give full recognition in the *Indian Act* to custom elections and the concept of reverting to custom. The second option would be to amend the *Indian Act* to empower Indian band councils to pass a bylaw establishing election rules for the band. In both cases, the end result would be significantly enhanced community control of the election process.

CUSTOM ELECTIONS

Recognizing the concept of reversion to custom in the Act would remove Indian communities from the specific regime spelled out under the *Indian Act*. However, as many Indian community leaders have noted, it would not necessarily meet current needs and circumstances. In fact, it became clear during Phase II discussions that many Indian communities do not wish to conduct elections solely in accordance with their custom, preferring instead to combine some elements of custom with modern election practices. The concept of reversion to custom is too narrow to accommodate this objective. As already indicated, legal problems could also arise in defining a band's custom in written terms.

BYLAW POWER

During Phase II, a strong consensus emerged among Indian communities for the idea of introducing a bylaw power in the *Indian Act* that would recognize bands' authority to determine their own election rules, incorporating local custom and tradition as they see fit. Such an approach has already been adopted by Indian bands under self-government legislation. For example, the *Cree-Naskapi Act* gives the nine Cree-Naskapi bands in Quebec the authority to make bylaws respecting the election process and terms of office of council members. Similarly, the *Sechelt Indian Band Self-Government Act* empowers the Sechelt Band of British Columbia to pass bylaws governing band elections. The band's constitution outlines procedural guidelines for electing council members.

From the point of view of flexibility, many Indian communities involved in Phase II discussions felt that the bylaw approach offered the greatest potential for responding to the diversity that exists among First Nations. In their view, this approach would also address problems associated with the legality of reverting to custom, since bands could incorporate tradition into their rules if they so desired. At the same time, it was held that the bylaw power should be available to bands as an option, and not a requirement, since some bands might want to continue to run elections under sections 74 through 79 of the Act.

Further, many Indian communities emphasized the need for the Minister to support bands in developing the capacity to take control of the election process in a gradual manner. These communities maintained that the bylaw power should enable bands to create a first set of election rules that would provide for continued support from DIAND for certain aspects of the process. For example, the view was commonly expressed that bands should be able to continue to rely on the department to either conduct the election or to handle election appeals. This initial set of rules, it was felt, could be amended later when the band was in a position to take control of the entire process.

On the other hand, some bands argued that once band rules are in place the proposed bylaw power should remove the Minister completely from any direct involvement with the band election process. However, these bands maintained that the department should provide financial support for conducting elections and advice and assistance in developing election rules to all bands wishing to exercise the proposed bylaw power.

While there was general agreement that election rules developed under the proposed bylaw power should be voted on by band members, there was considerable debate within Indian communities over what level of community approval should be required for the rules to be enacted. Some bands felt that a majority vote (50 per cent plus one) of *all* members should be required, as is currently the requirement for approval of membership codes. Other bands suggested that a majority vote of the members who attended a meeting held specifically to review the election rules would be sufficient. This is similar to existing rules for voting in referendums on such matters as land surrenders.

Clearly, if such a bylaw power were provided, the extent of electoral support required for the new rules would have to be resolved. As well, some bands might want to permit off-reserve members to vote on the rules, especially if it was the bands' intentions that those members would be eligible to vote in the election itself.

Ministerial approval of the rules would likely also be required to ensure that they have been consented to by the electorate and that they do not violate the *Charter of Rights and Freedoms*. Under the Charter, elections in Canada must be "free" (each citizen has the right to vote, to be a candidate, to campaign on someone else's behalf, to exercise other fundamental freedoms, etc.) and "fair" (the election process and appeal mechanism must be open, accessible and understandable). For their part, Indian communities suggested that the Minister's role in "approving" the election rules should be extremely limited. Many suggested that the Minister's role should be similar to that played in the recognition of membership codes: i.e., essentially restricted to ensuring that the process followed was appropriate and that the Charter was respected.

Many bands also felt that the proposed bylaw power should include a provision permitting bands to return to the election process defined by the *Indian Act* if and when they so desired. This option, it was felt, could be contained in the new power, possibly based on the same electoral assent as required for initial approval of the election rules.

Finally, it has been suggested that bands that use this proposed bylaw power to develop their own election rules should have the option of defining their own appeal process. Bands visited in Phase II expressed a number of alternatives, including:

- appeals directly to the courts;
- appeals to a council of elders, senate or tribal council;
- appeals to a band-selected appeal board; and
- appeals to some form of local, regional or national Indian-controlled body that might have responsibility for a variety of rights-related issues.

A Flexible *Indian Act* and IBER

"Flexible and sensible changes to the Indian Act and to the IBER should be made as soon as possible to provide a more workable election process for bands who don't yet want to take on full responsibility for their elections."

Band Councillor
LRT Review Meeting
Terrace, British Columbia
September 12-14, 1988

"The principle in any changes to the Act or IBER should be that they make the system as flexible as possible — let bands decide."

Band Councillor
LRT Review Meeting
Vancouver Island, British Columbia
September 20, 1988

Problems and Options for Change Identified by Indian Communities

Even if agreement can be reached to introduce a bylaw power in the *Indian Act* to recognize bands' authority to establish their own election rules, it is likely that some bands will want to continue to operate under sections 74 through 79 of the Act. Among other details, these sections set out:

- the make-up of a council;
- the eligibility of voters (18 years old and normally resident on reserve) and candidates for council;
- the establishment of electoral sections on the reserve;
- the length of term of office (two years) and the Minister's power to remove an individual from office;
- the Minister's authority to recommend that an election is invalid (if corrupt practices were carried out in connection with the election, the Act was violated in a way that affected the outcome of the election, or one of the candidates was ineligible); and
- the powers of the Governor-in-Council to make election orders or regulations on such subjects as nomination meetings, the appointment and duties of electoral officers, the manner in which the voting shall be carried out, election appeals, the definition of residence for the purpose of determining voter eligibility, etc.

During Phase II of the Review, Indian community leaders pointed out several specific problems with the current *Indian Act* and IBER election regime that must be resolved in order to bring the legislative and regulatory base into line with current Indian circumstances. These include:

- the Minister's sole and discretionary authority to bring bands under the *Indian Act* for election purposes;
- voter eligibility;
- the length of term of office;
- the lack of eligibility criteria for running for chief;
- the Minister's sole and discretionary authority to remove a councillor or chief from office; and
- problems with the clarity and definition of many aspects of the election process as currently set out in the *Indian Band Election Regulations.*

The overriding message received from Indian people during Phase II was the need for more flexibility — both in the Act and the Regulations — for those bands that do not yet wish to develop their own election rules. A number of options for change have been put forth in this regard. Some of the more interesting suggestions for change are highlighted in the following pages.

MINISTER'S AUTHORITY TO BRING BANDS UNDER THE ACT FOR ELECTION PURPOSES

The Minister's sole and discretionary authority to bring a band under the election provisions of the *Indian Act* is seen as paternalistic by many Indian communities. Under Section 74(1), a band may be brought under the Act if the Minister "deems it advisable for the good government" of the band. No provision is made for a band to take this action itself.

During Phase II discussions, two options for change were put forward:

- Section 74(1) could provide that a band can be brought under the Act only at the request of the band; or
- it could provide that this may be done by direct ministerial order or by the Minister *at the request of the band.*

In either case, the amended Act would remove the sole power of the Minister to bring a band under the Act for election purposes.

VOTER ELIGIBILITY

The issue of voter eligibility emerged as a major area of concern during Phase II discussions. Under Section 77 of the current *Indian Act*, to be eligible to vote in a band election a person must be a member of the band, at least 18 years of age and ordinarily resident on the reserve. "Ordinarily resident" is defined in the *Indian Band Election Regulations.*

While some bands expressed concerns respecting the age limit for voting in band elections, the "ordinarily resident" requirement was the main source of concern to most Indian leaders during Phase II discussions.

In the view of these leaders, the definition of "ordinarily resident" in the IBER does not, in many instances, reflect the circumstances of individual band members or the band's customs, history and traditions. For example, the requirement that a person must be "ordinarily resident" can prevent active band members who may be living off-reserve for a variety of reasons (e.g., for employment purposes) from voting.

Bill C-31 has compounded the above problem. This legislation authorized Indian bands to take control of their membership, and many of the bands that have done so want non-resident members to be eligible to vote in band elections. The current Act does not provide for this.

It has been suggested by some bands that the Act could be amended to delete the term "ordinarily resident", thereby limiting eligibility criteria to a person being 18 years of age and a band member. However, this option would not provide any choice to those bands that might wish to have a residency requirement in order to be eligible to vote. Alternatively, the term could be retained, with bands given an option to define "ordinarily resident" or to remove that criteria. This would enable those bands that chose to retain the term, to define "ordinarily resident" according to the circumstances that best suit their particular community.

If residency is to remain as one of the criteria to vote in band elections, many community leaders have suggested that it may be necessary to reconsider the way "ordinarily resident" is handled in the IBER. While a number of approaches exist, generally two options have been widely proposed.

The first would be to provide a narrow definition of "ordinarily resident" in the IBER, with an option for a band to formulate its own definition. Alternatively, the IBER could be revised to incorporate a broad definition, again with bands given the option to formulate their own definitions. Either approach would of course, provide bands with the flexibility that they have indicated is required related to voter eligibility.

TERM OF OFFICE

Another problem area is the length of the term of office. According to many Indian communities, limiting band councils to a two-year term provides the council with little time to come to grip with problems, develop programs, take control of financial matters, implement action plans and see the results.

In this regard, two principal options emerged during Phase II for increasing the length of the term of office. One was to amend the Act to state that chiefs and councillors will hold office for a defined period of three *or* four years. Alternatively, the Act could be amended to specify that the term of office should be not less than two years and not more than five years, with the exact term of office to be determined by each band. It was also suggested by some Indian leaders that staggered terms should be considered in order to provide for some continuity between councils.

ELIGIBILITY TO RUN FOR THE OFFICE OF CHIEF AND COUNCILLOR

Section 75(1) of the *Indian Act* provides that only persons who are eligible to vote in a band election (i.e. persons who are members of the band, at least 18 years of age and ordinarily resident on the reserve) may be nominated for the office of councillor. These persons must also reside in the section of the reserve they are nominated to represent. The *Indian Act* establishes no eligibility criteria with regard to who may run for chief.

While there was little difficulty with the criteria to run for council, most communities visited during Phase II of the Review had major concerns with the lack of criteria to run for chief. In theory, this could result in a non-Indian, non-resident of the reserve running for the office of chief. It has been suggested that the lack of eligibility criteria could be addressed through an amendment to the Act stating that a person running for chief of a band must be an eligible elector of the band. There was close to unanimous agreement that this change must be made to the Act.

An additional eligibility problem arises from the concept of dual candidacy — a situation that arises when one candidate runs for the office of both chief and councillor in the same election. Dual candidacy is not dealt with in any way under the existing *Indian Act* and IBER. It is supported to some extent by some Indian communities, particularly small, remote bands that have only a few qualified individuals interested in running for office. However, most bands expressed the view that dual candidacy should not be allowed.

The issue of dual candidacy could be addressed through an amendment to the *Indian Act*. For example, a revised Act could state specifically that no candidate in an election may run for both offices. However, since some bands may want to permit dual candidacy, it may be more appropriate to deal with this issue through the IBER. In this regard, the Regulations could be amended to permit each band to decide whether dual candidacy will be permitted, or to incorporate options on how to handle dual candidacy.

REMOVAL FROM OFFICE

Subsection 78(2)(b) of the Act authorizes the Minister to declare a person unfit to hold office. Although this subsection has seldom been used, it is regarded as paternalistic and intrusive by Indian leaders, many of whom have suggested that it be eliminated from the Act.

With such an amendment, however, it might be necessary to state specific, objective criteria to define when an office becomes vacant. These criteria could include when a person dies or resigns, is convicted of an indictable offence, or is convicted of a corrupt practice in an election held under the Act. Alternatively, the power to define when an office becomes vacant could be given to each band.

SIZE OF COUNCIL

Section 74(2) of the Act provides that there will be one councillor for every 100 band members, with a minimum of two and no more than 12 councillors per band. Only the Minister may vary the size of the council.

During Phase II discussions, many Indian communities indicated that Section 74(2) prevents individual bands from deciding the size of council needed for good government of the band. In this regard, some bands indicated a preference for small councils — which they regarded as more efficient and effective — while others indicated that larger councils are required to represent the diverse interests of the community. In any case, it was widely felt that decisions on the size of the council should rest with bands, and not the Minister.

To address these concerns, it was proposed that individual bands should be permitted to decide the number of councillors, perhaps with only minimum and maximum numbers specified in the Act. This amendment would enable Indian communities to determine the size of council that is most appropriate for the conduct of band affairs.

THE ELECTION PROCESS

During Phase II discussions, many Indian leaders indicated that numerous problems existed in the actual process of running band elections. This process, as defined in the *Indian Band Election Regulations*, is out of date, incomplete and often cannot be followed in a practical way. Three principal problem areas were identified by Indian communities:

- the absence of rules or clear procedures for many important aspects of the election process;

- the appointment, roles and responsibilities of the Chief Electoral Officer; and

- the need to define appropriate time frames for many aspects of the overall election process.

In regard to the first problem, Indian communities cited as a major concern the lack of rules or criteria for such important aspects of the election process as election declaration and nomination meetings, preparation of the voters lists, campaigning at polling stations, law and order at the polls and recounts. The fact that such fundamental elements of the process are not adequately provided for in the existing IBER is seen as a significant impediment to the smooth and orderly conduct of elections in Indian communities.

While it is clear that these aspects of the election process must be provided for in the IBER, no consensus has yet emerged on the approach to be adopted. Each of these problem areas will, therefore, require further discussion during Phase III of the Review. However, some of the more interesting suggestions put forward by Indian communities to date are discussed below.

First, with respect to the election declaration meeting and the nomination meeting, it was proposed by Indian leaders during Phase II that the IBER could be revised to provide for a formal Election Declaration Meeting to be held to start the election period. Such a meeting (or the nomination meeting) could provide a forum for discussing proposed bylaws or referendum questions that may be included on the ballot, as well as other matters related specifically to the election.

Another interesting proposal was to establish a Board of Revision to update the voters list. It was envisioned that such a board could comprise two or three local community members (not necessarily members of the band) appointed by the band or the outgoing council. The board could receive both oral and written requests for changes to the voters list. This was seen as potentially a more equitable means of establishing the list of eligible electors than currently exists.

In addition to the above process-related problems, there are a number of more specific matters (e.g., tie votes, dual candidacy and proxy voting) that are not dealt with under the existing Regulations.

While provision must be made for these matters in the IBER, Indian communities indicated during Phase II discussions that they require the flexibility to alter the rules and procedures to take into account local needs, customs and traditions. Such flexibility would provide for better treatment of these aspects of the election process by placing the emphasis on band determination of the rules.

The second major problem with the procedural side of the *Indian Act* election regime that arose during discussions with Indian communities centres around the appointment, roles and responsibilities of the Chief Electoral Officer (CEO). Under the existing IBER regime, the CEO's powers are extremely limited. For example, the CEO cannot take oaths, make decisions in emergencies or delegate authority and responsibility to deputy electoral officers. These and other limitations can restrict the ability of the Chief Electoral Officer to ensure that the election process runs smoothly, fairly, and in line with the requirements of the *Indian Act* and IBER. This, in turn, prompted discussion of who should run the election process, with some communities indicating strongly that elections should be run by an objective third party (i.e., *not* the band and *not* DIAND).

As with the process-related problems discussed earlier, no clear consensus emerged for dealing with the appointment, duties or powers of the Chief Electoral Officer. This issue will be further explored with Indian communities during Phase III.

The third problem identified by Indian communities related to the conduct of band elections is the need to define appropriate time frames for the many steps in the election process. Under the existing IBER, the only reference to timing is that the election must be called at least 12 days before it is to be held. However, as already discussed, Indian communities have indicated a need to provide clear time frames for such aspects of the election process as the prepartion of the voters list, the holding of formal election declaration and nomination meetings and for the orderly conduct of recounts. Many Indian leaders have also suggested that provision ought to be made to allow for a transition period following a band election to enable the in-coming council to become familiar with the business affairs of the community and to provide a measure of continuity between councils. Further, as many bands pointed out, if the electorate is provided with options related to aspects of the election process that must be decided by a band vote (e.g., dual candidacy or the definition of "ordinarily resident") then even more time must be provided for in the process.

In order to accommodate these new elements, and to provide Indian communities with the flexibility to run elections according to local needs and circumstances, it is estimated that a minimum of 70 days and perhaps as many as 90 days may be required for the overall election process. This time frame problem can be addressed through amendments to the IBER.

ELECTORAL SUPPORT FOR CHANGE

Many of the options for amending the Act and Regulations discussed above would provide bands with considerable flexibility and more control over their elections. However, providing "options" means that choices must be made with respect to different aspects of the election process. This would likely also require amendments to the Act and regulations to define how the band obtains electoral support for its decisions on which options to adopt. In turn, this raises the question of what level of electoral support should be required? As noted earlier, there was less than unanimous agreement on this question.

Election Appeals

"An appeal procedure should enforce the fact that the elected are answerable to the electors. When there are problems, there could be a council of elders or a senate to rectify those problems and any such body would have its powers defined by the people."

Band Councillor
LRT Review Meeting
Sakimay, Saskatchewan
September 27, 1988

"Appeals should be dealt with locally and settled on site — but not by the band itself."

Band Councillor
LRT Review Meeting
Vancouver Island, British Columbia
September 21, 1988

Problems Identified by Indian Communities

Under the current *Indian Act* and the IBER, an election candidate or the electors can, within a stated time period, lodge election appeals with the department. DIAND reviews the facts surrounding the appeal and, where necessary, appoints an individual to conduct an investigation and report to the department. Based on this report, the Minister can ask the Governor-in-Council to set aside all or part of the election results, as provided for in Section 79 of the Act.

In recent years, the election appeal process has become one of the most controversial aspects of the *Indian Act* election regime.

For example, it is widely accepted that the appeal process is cumbersome and poorly defined in the Regulations. Despite recent improvements, the process is lengthy, often taking from six to eight months. Once a decision has been made, there is no opportunity for discussion; the only recourse is the courts. Some communities have protested that decisions have been inconsistent, even on a series of appeals from the same band.

Another problem commonly raised by Indian communities is that investigating officers (usually from DIAND district or regional offices) are not provided with the powers, authority and training to analyze appeals properly.

Further, First Nations participating in the Review to date and departmental officials have indicated that DIAND's role in the appeal process may place the department in a conflict of interest position. This is because DIAND is frequently involved in virtually all aspects of elections conducted under the *Indian Act*, including appeals. Indian bands have suggested strongly that, at a minimum, DIAND should be removed from direct involvement in election appeals, and that a different mechanism should be explored. Bands have also stressed that appeals should be heard in or near the community where the election is at issue, and that Indian people should be involved.

Options Proposed by Indian Communities for Dealing with Election Appeals

Unless the *Indian Act* is amended, the role of the Minister and the Governor-in-Council in handling election appeals cannot be altered to the satisfaction of many bands. For example, the Minister cannot be removed from ruling on election appeals without changing the Act.

However, changes to appeal procedures can be made through amendments to the IBER. During Phase II of the Review, several proposed changes were identified.

DECENTRALIZE PRESENT REGIME

For example, it was suggested that the IBER could be amended to make DIAND Regional Directors General responsible for all aspects of the appeal process up to and including forwarding a report to the Minister. It is anticipated that such an approach would result in quicker processing of appeals. In response to this suggestion, DIAND launched a pilot project in Saskatchewan to assess the feasibility of decentralization. The project is currently being evaluated — with encouraging initial results — to assess whether it would be appropriate nationally.

Under this scenario, Regional Directors General could appoint a qualified investigating officer to examine the appeal. This person could be a departmental official, a private citizen or one or more Indian individuals who are not members of the band where the appeal has arisen — but people in whom the band has confidence. Again, this approach may result in quicker processing of appeals, perhaps by a person or persons more familiar with Indian communities.

INDIAN BAND APPEAL PANEL

A second option for change could be to create an Indian Band Appeal Panel. This would significantly remove DIAND from the appeal process, until the Act could be amended, and at the same time provide for Indian management of the process. Under this concept, panel members could be appointed from each region where bands conduct *Indian Act* elections. Hearings could then be held in the community where the election is at issue.

In addition to being provided with a variety of powers to investigate appeals, such a panel could serve as a centre of expertise on elections and help ensure consistent, precedent-setting recommendations to the Minister. It could potentially also be mandated to provide advice to bands operating under custom elections, and report annually on its activities and subsequent decisions by the Minister. If the Act is amended, the panel would already be in place as a fully independent appeal mechanism.

COURTS

As an alternative to making changes to the IBER, the *Indian Act* could be amended so that the only appeal route (other than that provided by bands themselves) would be to the courts. While this would remove DIAND from the process, it would likely be less than satisfactory for many Indian bands given problems of access to the courts, costs and, in many cases, the distance from a court's location. The courts' lack of familiarity with the varying circumstances in Indian communities was also seen by some leaders as a potentially significant factor.

JUSTICES OF THE PEACE AND OTHER OPTIONS

Finally, it was envisaged by many Indian community leaders that several of the options proposed under the First Nation Law component of the Review for balancing collective versus individual rights, or administering justice, could prove workable for resolving election appeals. In this regard, the increased use of justices of the peace, or the establishment of an Indian human rights tribunal or an Indian justice system, could all provide an appropriate election appeal route.

For example, justices of the peace could be empowered to investigate appeals and report to the Minister. If the Minister is removed from the appeal process, justices of the peace could serve as a first level of judicial review of appeals. Alternatively, an Indian human rights tribunal, perhaps composed of prominent Indian community leaders or other interested parties, could hear election appeals in addition to reviewing a vast array of other rights issues. Band election appeals could also be dealt with by an Indian justice system without the involvement of the Minister or the Governor-in-Council. This route was seen by many Indian communities as the ideal solution, albeit a long-term solution given political, jurisdictional and resource questions that would need to be worked out through bilateral or trilateral discussions.

Interim Departmental Initiatives

Phase III of the Lands, Revenues and Trusts Review will involve significant discussions with Indian communities to determine which options for change may appropriately be pursued by the federal government. In the interim, the LRT Review process has identified a number of areas where Indian community leaders believe immediate action could be taken to improve internal departmental processes, primarily in response to concerns expressed by the Auditor-General.

For example, projects completed or under way at the time of publication include:

- the development and delivery of a more comprehensive course on how to conduct elections for departmental or band-appointed electoral officers;

- review of the existing policy regarding reversion to custom elections; and

- exploring the potential for decentralization of the election appeal process to the regional level (as noted earlier, initial results from the Saskatchewan pilot project in this regard have been encouraging).

Moving into Phase III

Indian input is essential to any substantive changes to the legislation, regulations and policies governing band elections. Moreover, flexibility is required in making changes as some bands may want to remain under the *Indian Act* for elections and others will want to define their own election rules.

Through the consultation process, Phase III of the Review will have to address several broad and difficult questions of concern to both DIAND and Indian communities related to elections and election appeals. For example:

- is there a role for the Minister and DIAND in the conduct of elections and election appeals if bands are provided with the authority to establish their own rules?
- to what degree can flexibility be achieved through changes to the Act and the IBER and still provide for a workable election process?
- what are the funding implications associated with the development and implementation of band election rules under the proposed bylaw power? and
- do First Nations favor an Indian-controlled institution to manage election appeals? Is it possible that such an institution could be mandated to address a variety of "collective versus individual rights" issues, not just election appeals? What is the preferred approach to establishing such an institution, and what costs are associated with that approach?

Indian views and answers to these questions are critical to making judgments on the specific options for change identified to date in the Review as well as others that may arise during the next phase.

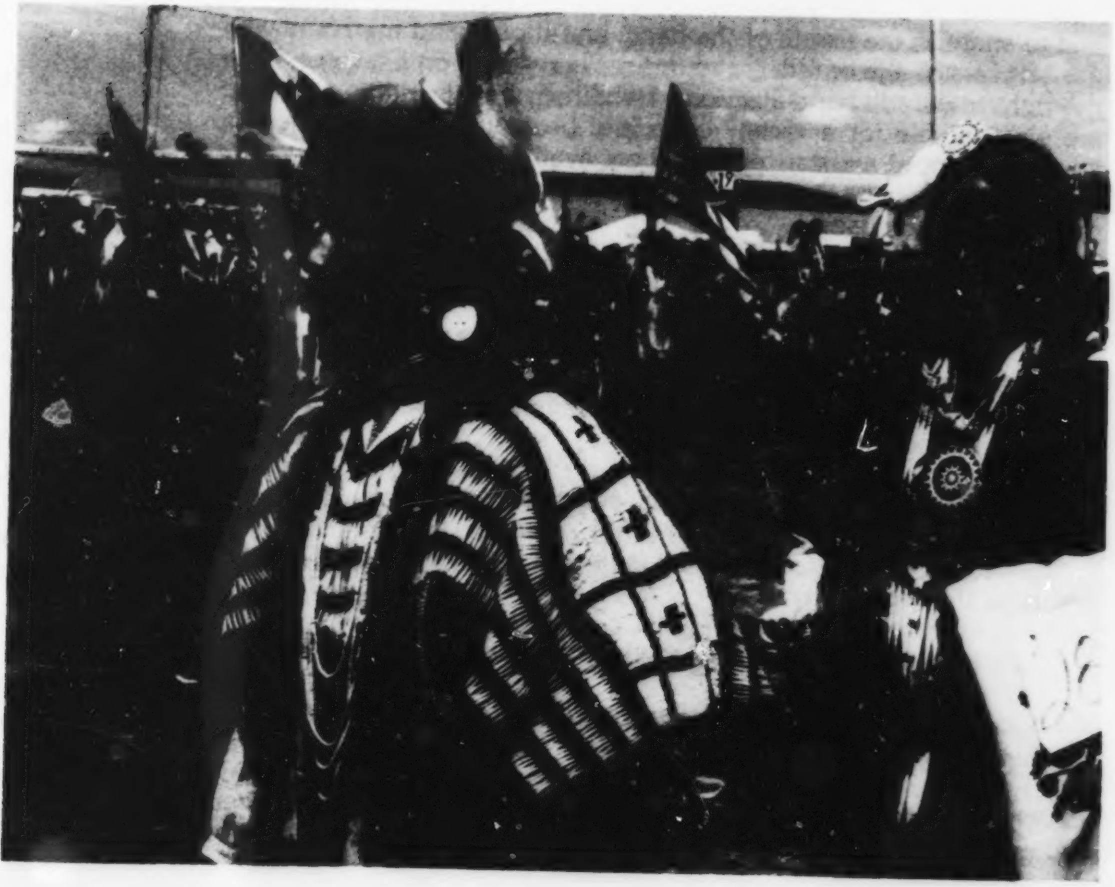
MEMBERSHIP

"Funds have not been made available to bands to enable them to cope with the results of Bill C-31 and provide needed services and housing to their people."

Band Councillor
LRT Review Meeting
Vancouver Island, British Columbia
September 20, 1988

"Most bands were not administering the Indian Register Program before so they have no funds and no trained staff."

Band Councillor
LRT Review Meeting
Terrace, British Columbia
September 14, 1988



Overview

Sections 5 through 17 of the *Indian Act* deal with the definition and registration of status Indians in Canada including membership in a band.

The granting of Indian status means that a person is formally recognized under the law as an Indian. Only the Indian Registrar, an official of DIAND, can grant status. This is done based on an assessment of genealogical information provided by the individual to meet the definition of a status Indian in Section 6 of the Act and the recording of ongoing vital events such as births and deaths. A list of status Indians, known as the Indian Register, is maintained by DIAND.

Status is important to Indians for several reasons. It is a symbol of their cultural heritage and provides them with certain benefits including assistance for post-secondary education and some non-insured health benefits. Status population figures are also used to determine federal funding for the provision of on-reserve services.

Status Indians may also be members of a band. Membership in a band means that Indian individuals and families can belong to a community as well as be entitled to the collective treaty and aboriginal rights of the band. Band members may have the right to live on a reserve and to share in the assets of the band, and those band members who are 18 years of age or older, and ordinarily resident on a reserve, have the right to vote in band elections. Band members living on a reserve are also eligible for a variety of federal programs, including health, education, social assistance and, where available, housing assistance. As well, they may be exempt from paying income tax on earnings from on-reserve enterprises.

Bill C-31

Passed by Parliament in June 1985, Bill C-31 contained important amendments to the *Indian Act*. These amendments have had an enormous impact on the granting of Indian status and the determination of membership in a band.

Bill C-31 had three principal goals:

- to eliminate discrimination based on gender and marital status in the *Indian Act*;
- to restore Indian status to victims of past discrimination; and
- to enable Indian bands to assume control over their membership.

As a result of Bill C-31, the *Indian Act* now essentially treats men and women equally when determining status, and prevents anyone from gaining or losing status through marriage.

As well, Bill C-31 established the legislative base by which individuals who had lost their status due to sexual discrimination, as well as their first generation children, could apply for reinstatement or first-time registration. This means that women who had lost their status because they married a non-Indian are now eligible to have their status restored.

In another important amendment, Bill C-31 abolished the concept of enfranchisement by which a person agreed to give up his or her status and band membership.

Under the amended Act, the following individuals are now viewed as status Indians:

- those individuals registered or entitled to be registered as status Indians when Bill C-31 became law on April 17, 1985;

- a person who is a member of a body of persons declared by the federal government to be a band on or after April 17, 1985;

- a person who, by reason of the new changes to the *Indian Act*, is now entitled to be registered as an Indian, including a person who previously lost or was denied status as a result of:

(a) the former "double mothers clause" which denied status to a child upon reaching age 21 because his/her mother was non-Indian and his/her father's mother was non-Indian;

(b) having married a non-Indian male;

(c) having been the legitimate or illegitimate offspring of a non-Indian male, but whose mother was Indian at the time the child was born;

(d) enfranchisement; or

- the first generation children of any of the above-mentioned persons.

The changes brought about by Bill C-31 are significant and far-reaching, particularly as they relate to Indian women and Indian children. Some of the most important results are the following:

- Indian women will no longer lose their status by marrying non-Indians;

- Indian women who lost their status because they married non-Indians are now able to enroll back into their former bands;

- children who lost their status as a result of their mother's marriage to a non-Indian are now eligible to have their Indian status restored;

- first generation children who were denied status as a result of being born after their mother's marriage to a non-Indian are now entitled to Indian status; and

- Indians who enfranchised, or relinquished their status in the past, are now eligible to have their Indian status restored as are their first generation children.

Restoration of status or first-time registration (also known as entitlement) is not automatic: it must be applied for by those who feel they have a right to status under the Act as amended by Bill C-31. DIAND verifies these claims (by searching genealogical records, etc.) before granting status.

By October 1989, more than 123,040 people had applied to have their status restored or to be registered for the first time as status Indians — a number which far exceeded initial expectations. As of the same date, more than 65,433 individuals had been granted status under Bill C-31 and are now listed in the Indian Register.

Membership Rules and Lists

Bill C-31 grants bands the right to apply to the Minister of Indian Affairs and Northern Development for control of their membership and maintenance of their band lists. Two conditions must be met for the Minister to approve such a transfer to the band. First, the Minister must be satisfied that a majority of band electors have consented to the band assuming control of membership as well as to the specific membership rules proposed by the band. Second, the membership rules proposed by the band must protect the rights of existing band members and of individuals who are entitled to be but are not yet registered as band members at the time the band assumes control of membership and maintenance of its band list.

Alternatively, bands may opt to leave control of their membership and maintenance of their band lists with DIAND. In such cases, the granting of status usually also confers membership in a band.

As of October 1989, some 290 bands had applied for control of their membership and maintenance of their band lists. Control has been granted to 229 of these bands. Fifty-one applications have been returned to bands because they did not meet both conditions stated above. The remaining 10 applications are under active review.

Role of DIAND

The Indian Registrar is specifically defined in the *Indian Act* as the DIAND officer responsible for the Indian Register and the band lists maintained by the department. In this capacity, the Registrar has the sole authority to add or delete individuals from the Indian Register in accordance with the entitlement criteria established in Section 6 of the Act. He or she is responsible for ensuring the accuracy and completeness of the Indian Register and of the band lists maintained by DIAND.

Applications for status under Bill C-31 are researched and a decision is made by a special Entitlement Unit at DIAND headquarters. As well, the Indian Registration and Band Lists Directorate* records changes in the Indian Register arising from births, deaths, marriages, divorces and other "registration events". There are approximately 40,000 such events each year. Currently, some 210 bands and tribal councils are administering the Indian registration system at the local level. A further 60-100 bands will be administering the field events by the end of March 1990, and many additional bands have submitted proposals to assume this function.

Within the Indian Registration and Band Lists Directorate, an Adoption Unit is responsible for determining whether Indian children adopted by status or non-status parents are eligible for registration. The unit also deals with requests for registration of non-Indian children adopted by status Indians and provides information to adoptive parents on the child's rights.

In addition to its statutory responsibilities, the directorate also provides accurate and timely information from the Indian Register and band lists to DIAND programs and to the Medical Services Branch of Health and Welfare Canada. This information, which is provided under strict compliance with the *Privacy Act*, is of vital importance to establishing effective program plans and calculating contribution agreements with bands.

Issues and Options for Change

Bill C-31 has significantly removed sexual discrimination from the *Indian Act*, restored lost rights for thousands of Indians and provided bands with greater control over their membership. However, the passage of this legislation has also raised some difficult problems and issues in terms of Indian status and band membership.

During Phases I and II of the Lands, Revenues and Trusts Review, discussions with Indian leaders and communities across the country focussed on three principal issues:

- the equity and fairness of Bill C-31 provisions on registration and band membership;
- the maintenance of accurate and current band-controlled membership lists; and
- the Indian Registration and Band Lists Directorate's capacity to respond effectively to its mandate.

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*Formerly referred to as the Membership and Entitlement Directorate.

Equity and Fairness of Bill C-31

"The government should not start programs or make legislative change if there are not sufficient funds."

Band Councillor
LRT Review Meeting
Terrace, British Columbia
September 14, 1988

"The experience with Bill C-31 has been in many ways disastrous and bands are living with the aftermath of the department's short-sightedness."

Band Councillor
LRT Review Meeting
Vancouver Island, British Columbia
September 20, 1988

Problems Identified by Indian Communities

Indian bands have expressed growing discontent with a number of legislative provisions and policy changes arising out of Bill C-31, both in terms of entitlement and membership. The main concerns are discussed below.

CONTINUED DISCRIMINATION

Many communities visited point out that Bill C-31 has not been altogether successful in eliminating discrimination from the *Indian Act*. In fact, a number of discriminatory provisions remain in the Act, or were created as a result of Bill C-31.

Under the revised Act, the children of reinstated Indian women must marry or have a child by a status Indian in order to pass on status to their own children. The same is not true for Indian men, even if they have married a non-Indian woman. The children of these marriages can pass on status regardless of who they marry.

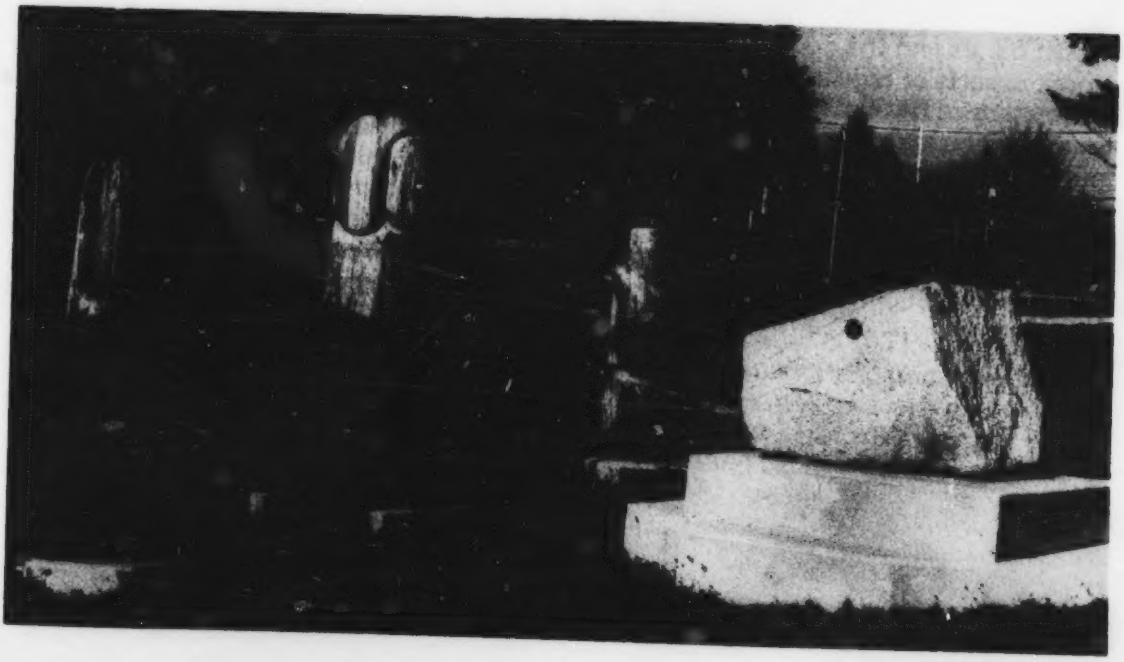
Moreover, the illegitimate male and female offspring of male status Indians are treated differently under the Act. Illegitimate males can pass on status to their children from a marriage to a non-status woman, but illegitimate women cannot pass on status if they marry or have a child by a non-status man. Some Indian communities have maintained that as a result of this provision, non-Indian children adopted by status Indians may have greater rights than children of Indian ancestry reinstated or registered under Bill C-31.

The Bill C-31 requirement to reinstate Indian women to their former husband's band is also a problem. Reinstated women believe they should be able to select the band to which they will be assigned (i.e., their birth band rather than the band into which they married). Indian community leaders have suggested that one long-term solution to this problem would be to amend the *Indian Act* to permit some flexibility in assigning reinstated women to bands. In the short term, it was suggested by Indian communities that movement between bands could be handled through transfers approved by both bands involved. DIAND has acted on this suggestion by developing an appropriate policy.

CUSTOM ADOPTION

DIAND's treatment of custom adoption by Indian families has also been altered by Bill C-31. Previously, custom adoption was a concern solely for the purposes of estate administration. (The *Indian Act* recognizes child adoption by "custom" but does not define custom. This can cause problems in determining the beneficiaries of a deceased Indian's estate.) However, Bill C-31 re-defined "child" to include a child adopted in accordance with Indian custom. As a result, the Indian Registrar is now obliged to include in the Register and on band lists any person who becomes, or became in the past, the child of Indians through custom adoption.

This has created a number of problems in determining when custom adoptions are legitimate and should be recognized for registration and estates administration purposes. For example, it becomes important to establish whether a band has, in fact, pronounced on a "custom" for adoptions. In reviewing individual cases, DIAND would then have to both confirm that an adoption has taken place *and* that it occurred according to the band's custom. To handle the custom adoption issue in a fair and consistent manner, it will be necessary for the department, in conjunction with Indian leaders, to develop policies and procedures that provide for fairness and equitable treatment in this sensitive area, reasonable documentary requirements, etc.



50 PER CENT PLUS ONE RULE

The "50 per cent plus one" requirement for obtaining the consent of the electorate related to membership rules is another source of growing frustration and is seen to be universally unacceptable by Indian communities. Bill C-31 stipulates that for a band to assume control of its membership, a majority of the band's electorate (50 per cent plus one) must vote to accept the membership rules. This approach discriminates against bands that follow traditional or customary practices in which many members refuse to cast a formal vote on such matters.

To correct this inequity, the *Indian Act* would have to be amended. It has been suggested by Indian communities that, at the very least, such an amendment should stipulate an approval requirement of only 50 per cent plus one of those who *actually vote* on the proposed membership rules.

BILL C-31 IMPLEMENTATION

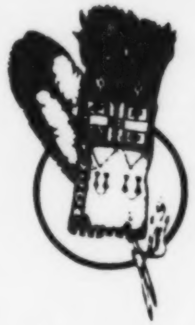
One of the principal concerns expressed by bands during Phase II of the Review centres around the federal government's political commitment that no band would suffer as a result of Bill C-31 implementation. A number of funding and policy issues were raised that centre around this point. However, program services and funding issues are not the subject of the LRT Review. A special Bill C-31 task force has been looking at the full range of issues raised, including program funding, land availability and infrastructure. Indian associations and communities have been providing input to this work. These concerns and issues will also be addressed when the Minister reports to Parliament in June 1990 on the Bill C-31 implementation exercise. In the shorter term, the department has acquired additional funding in the amount of $1.4 million for 1989-90 and $1.7 million for 1990-91 to assist bands and the department with the administrative and management aspects of registration and membership flowing from the implementation of Bill C-31. As well, a further $1.5 million is available for additional bands to develop and implement their own membership rules.

Band-controlled Lists

> *"The split with the department maintaining the Indian Register and bands maintaining their own membership lists. . . impedes the flow of information and leads to inaccuracies in the Register."*
>
> Band Councillor
> LRT Review Meeting
> Vancouver Island, British Columbia
> September 20, 1988

"Even if funds were available, there is no source of training as the department does not have the time or capacity and no one else knows the subject."

Band Councillor
LRT Review Meeting
British Columbia
September 14, 1989



Problems Identified by Indian Communities

The Bill C-31 amendments to the *Indian Act* enable bands to assume control of their membership and maintain their band lists. This has created several problems which may have long-term implications for individual Indians and Indian communities.

For example, the transfer of membership lists to some bands means that DIAND no longer serves as, or has access to, a single data source on band membership. Two distinct problems arise from this situation.

First, bands which have assumed control of their band lists are under no legal obligation to provide membership information to DIAND which requires this data to seek funding to resource programs properly and, in turn, to calculate contribution agreements. The absence of a sound data source on membership and on-reserve population statistics could seriously jeopardize DIAND's ability to justify funding requirements to Parliament. As indicated earlier, other federal departments (such as Health and Welfare Canada) and provincial governments also require accurate demographic information for strategic planning and program funding purposes.

Second, many bands indicated that they are not in a position to maintain up-to-date band lists. This has essentially been characterized by Indian bands as a funding, training and support issue.

When a band assumes control of its membership and maintenance of its band list, it also assumes responsibility for the accuracy and completeness of the list. However, in the view of most bands that have taken control of their membership, DIAND has not lived up to its obligation to provide adequate funding, training or systems support for maintaining membership lists.

Further, access by Indian bands to information held in government files has also become a problem because of the *Privacy Act*. The Act significantly restricts the type of information relating to an individual's Indian status that the federal government can release to bands. In turn, this can greatly increase the amount of time bands must devote to researching an individual's background to determine whether he or she is eligible for membership.

For those bands that administer both the registration and the membership functions, access to information is less of a problem because they have ready access to much of the information on an individual's Indian status. However, at present, only about 70 of the 229 bands that have control of membership also administer the registration function. As a result, most bands that have taken over the membership function do not have the records or the experience to deal with membership matters.

DIAND has developed a funding formula to offset band costs associated with maintaining up-to-date and accurate registration and membership information. However, Indian communities have argued that this funding formula is heavily weighted in favor of those bands that have taken control of *both* the registration and membership responsibilities. These communities have also argued that the formula does not adequately reflect the research and other costs that most bands must incur to establish eligibility for membership, or for an appeal process. Finally, it has been maintained that the formula, which is based on the size of a community, penalizes small and medium-size bands.

During Phase II of the Review, two proposals were put forth to resolve the problems related to band-controlled lists. The first would be to facilitate the accelerated devolution of the registration function to bands that control their membership and maintain their band lists. This would help address the information problems associated with the *Privacy Act* and make the existing funding formula more attractive. Adequate resources were identified as the main obstacle to such an approach, as many bands are already willing to take on the registration function. DIAND has taken action in this regard and obtained additional funding for 1989-90 and 1990-91. This funding will also be used to help bands who have control of their membership to take on the responsibility of administrating the registration program. As noted earlier, it is anticipated that by March 1990 from 60-100 additional bands will take advantage of this funding and will be administering the registration function at the local level.

Secondly, it has been proposed by Indian communities that the federal government should honor its obligations related to Bill C-31 implementation by taking a more active and constructive role in providing training and systems development support to communities that take control of the membership program. In the longer term, the need for a better funding approach was continually raised during Phase II. Most proposals emphasized a need for sufficient resources to hire an appropriately qualified band officer to deal with the work load. The current model used to fund bands administrating the social development program was frequently cited as a good approach to resolving the membership and registration issue.

Capacity of the Indian Registration and Band Lists Directorate

"Lists kept by the department were four years out-of-date before Bill C-31. "Now the problem is tripled."

Band Councillor
LRT Review Meeting
Terrace, British Columbia
September 14, 1988

"The Adoption Unit is years behind in processing documents to enable adopted children to be counted in the band population. This problem also contributes to family stress."

Band Councillor
LRT Review Meeting
The Pas, Manitoba
September 14-15, 1988

Bill C-31 has resulted in a dramatic increase in the work load for DIAND's Indian Registration and Band Lists Directorate — certainly to a much greater degree than had been anticipated. In addition to contending with 40,000 to 50,000 routine changes to the Indian Register each year (as a result of births, deaths and marriages), the directorate has been faced with a constant flow of applications for status and for approval of band membership rules. Since Bill C-31 was passed, the department has received 69,574 applications for reinstatement or first-time registration, and continues to receive in the neighborhood of 35 new applications each day. As a consequence, the directorate's capacity to fulfil its mandate has been seriously strained.

A number of specific problems have been identified in this regard. For example, significant backlogs developed in the processing of applications which led to criticism from many Indian bands. To address this concern the department has, over the past two or three years, employed some 50 to 60 additional people specifically to process applications for reinstatement or first-time registration. In addition, the Membership Directorate has introduced a system of productivity cycles to gain control of the existing work load and to streamline operations. The directorate's systems for processing and recording registration and membership events were also enhanced.

The first productivity cycle, together with the other improvements mentioned above, resulted in the virtual elimination of the backlog of Bill C-31 applications where the required background information was complete and readily accessible. During the second productivity cycle, which is currently under way, efforts focused on processing applications requiring more in-depth research as well as on the adoption unit's caseload. As of October 1989, 5,500 applications remain to be processed with completion scheduled for the end of March 1990.

The degree of documentation DIAND requires to substantiate claims to status is another concern frequently mentioned by Indian communities during Phases I and II of the Review. In many areas, historical records are lacking. As well, many applicants do not possess birth certificates and the search for alternate documentation is often beyond their means. Indian bands have indicated the need to simplify the documentation requirements, particularly in cases where documents are likely to be difficult to obtain, and for DIAND to take a more active role in helping applicants and potential applicants meet these requirements.

Another significant problem identified by DIAND and some Indian communities is the department's out-dated registration system. In particular, the accuracy of data in the system has been brought into question. In addition to the systems changes referred to earlier to assist in the processing of applications, it has been proposed that DIAND re-design the system and increase the quality control aspects associated with data going into the Register. It has also been suggested that access to the system should be improved at the regional level to facilitate local enquiries.

Finally, it has been proposed that DIAND headquarters should adopt a stronger national leadership role in such areas as establishing policy and monitoring and evaluating the ongoing registration and Bill C-31 re-instatement process. For example, it has been suggested that the department establish improved working relationships with provincial ministries that provide much of the vital information required to maintain the accuracy of the Indian Register in terms of births, deaths and marriages.

Interim Departmental Initiatives

As noted above, DIAND has introduced several organizational, systems and procedural changes to respond to the increasing volume and complexity of the Indian Registration and Band Lists Directorate's operations. This work is expected to continue during Phase III of the Review.

For example, a number of initiatives are under way to better support the accelerated transfer of the status registration program to bands. As well as securing additional funding for the transfer process (as noted earlier), DIAND has developed a new, more comprehensive training program to improve the support being provided to band membership clerks and staff in DIAND district offices. This training program, which is currently being implemented, will be ongoing and should help address concerns raised by some Indian communities related to staff turnover.

The directorate has also hired a consultant to examine the entire registration system with a view to re-designing completely the system to handle effectively the significantly increased volume of entries. The issue of quality control will be addressed in a comprehensive fashion as part of that review in order to further improve the accuracy and timeliness of information related to status individuals. In addition, the organization of the Indian Registration and Band Lists Directorate is being examined to ensure that it adequately supports the Registrar in carrying out his/her statutory functions.

Finally, the directorate has been working on a number of new policy initiatives — a process that is also expected to continue during Phase III with input from Indian communities. For example, a formal transfer process has been developed and is being implemented by DIAND to deal with transfers involving bands which control their membership. Under this process, both bands must indicate to the department in writing that they have agreed to the transfer of membership. A status Indian who is changing bands cannot have his or her name added to the new band before it is removed from the list of the individual's previous band. Once this is achieved, the Indian Register will also be changed to reflect the transfer. In this way, the department is hoping to contribute to the overall integrity of band lists and, therefore, to ensure greater funding stability. Perhaps more importantly, it is hoped that this process will address some of the concerns raised by reinstated Indian women who currently have no option on which band they are assigned to upon reinstatement. It will also permit the recording of transfers between bands in situations where one of the bands has taken control of its membership and is maintaining its band list.

As well, a proposed approach for dealing with custom adoptions is being developed. Central to the options under study is the need for a single group within the department to assume lead responsibility for matters related to custom adoption. It is also recognized that clear procedures are required for validating adoptions and that documentation requirements should be kept flexible.

Moving into Phase III

During Phase III of the Lands, Revenues and Trusts Review, the focus will be on identifying with Indian communities potential options and approaches to address the following equity and fairness issues:

- removal of the remaining discriminatory provisions related to the treatment of Indian children;

- ensuring that band approval requirements for taking control of the membership program are more reasonable and reflect the realities experienced by many bands with a strong traditional component; and

- addressing in a comprehensive fashion outstanding resources and funding issues related to Bill C-31.

Phase III will also see the implementation of a number of management initiatives including organizational changes to facilitate the maintenance of, and access to, timely, accurate and up-to-date information respecting both registration and membership.